CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 244.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS ET AL., BANKRUPTS, APPELLANT,

vs.

THE VARICK BANK OF NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 2, 1906.

(20,167.)

(20,167.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 244.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS ET AL., BANKRUPTS, APPELLANT,

vs.

THE VARICK BANK OF NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the district court of the United States for the northern district of New York	*a*	1
Statement	1	1
Original partnership proof of debt	2	1
Original individual proof of debt	4	3
Collateral note and agreement of pledge, &c	6	4
Amended partnership proof of debt	13	7
Amended individual proof of debt	21	12
Objections to partnership debt	27	15
Objections to individual debt	31	17
Record of proceedings before referee	34	18
Conceded facts	35	19
Referee's ruling	41	22
Opinion of district judge affirming ruling of referee	42	23
Order appealed from	50	27
Notice of appeal	52	28
Allowance of appeal	53	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1906.

	Original.	Print.
Citation	54	29
Assignment of errors	55	29
Exhibit A—Bill of sale of $50,000 policy from Varick Bank of New York to Herbert M. Delanoie	60	32
B—Bill of sale of $50,000 policy from Samuel Goldsticker, auctioneer, to Herbert M. Delanoie	60	32
C—Bill of sale of $10,000 policy from Varick Bank of New York to Herbert M. Delanoie	60	32
D—Bill of sale of $10,000 policy from Samuel Goldsticker, auctioneer, to Herbert M. Delanoie	61	32
E—Transfer and assignment of $50,000 policy by Jacob M. Mertens to Varick Bank of New York	61	33
F—Transfer and assignment of $10,000 policy from Jacob M. Mertens and Jennie Mertens to Varick Bank of New York	63	34
G—Transcript of $50,000 policy	65	35
H—Transcript of $10,000 policy	69	37
I—Transfer and assignment of $10,000 policy from Jennie Mertens and children to Varick Bank of New York	72	39
J—Check of Varick bank on Western national bank	75	41
Stipulation waiving printing of portion of record on appeal	75	41
Clerk's certificate to record on appeal	76	41
Opinion	78	42
Decree	87	47
Findings of fact	89	48
Conclusions of law	116	66
Petition for appeal	119	67
Allowance of appeal	120	67
Assignment of errors	122	68
Clerk's certificate	125	69
Citation and service	126	69

a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB M. MERTENS ET ALS., Bankrupts; THE VARICK BANK OF NEW YORK, Appellant.

Transcript of Record.

Appeal from the District Court of the United States for the Northern District of New York.

1 United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS and Others, Bankrupts.

Statement.

1904.
Sept. 10.—Proof of claim of Varick Bank of New York against co-partnership estate and individual estate filed.
Nov. 14.—Objection to the allowance of said claims by Trustee filed.
Dec. 1.—Hearing on allowance or disallowance of claims held before Referee.
" 2.—Claims disallowed by Referee.
" 17.—Petition to review Referee's ruling filed.
" 19.—Referee's certificate filed.
1905.
Jan. 17.—Memorandum, Ray, *J.*, on confirmation of Referee's ruling disallowing claims.
" 21.—Order filed approving Referee's ruling disallowing claims.
" 21.—Notice of appeal and allowance thereof filed.
" 21.—Citation issued and filed.
" 21.—Creditors' assignments of errors filed.
—Stipulation waiving certain portions of record on appeal filed.

2 *Original Partnership Proof of Debt.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, as Composing the Co-partnership Firm of J. M. Mertens & Co., Bankrupts.

In Bankruptcy. 1527.

At New York City, in the Southern District of New York, on the 9th day of September, A. D. 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey,

and made oath and says that he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to do business in the City of New York, County and State of New York; that this proof is not made by the treasurer of such corporation for the reason that said corporation has no treasurer and that the affiant is an officer of such corporation and his duties most nearly correspond to those
3 of treasurer, and that he is duly authorized to make this proof; and that the said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, as composing the firm of J. M. Mertens & Co., against whom a petition for adjudication of bankruptcy has been filed, were at and before the filing of the said petition, and still are, justly and truly indebted to said corporation in the sum of twenty-seven thousand eight hundred ninety-three and 85/100 ($27,893.85) dollars; that the consideration of said debt is as follows:

That heretofore said Varick Bank of New York discounted for the account of said J. M. Mertens & Co., bankrupts above named, and is now the owner and holder for value, of the notes herewith presented, copies of which are hereto annexed and made a part hereof.

That no part of said debt has been paid; that there are no set-offs or counterclaims to the same, except the sum of one hundred seventy-three and 21/100 ($173.21) dollars held by the said Varick Bank of New York, as a general deposit to the credit of J. M. Mertens & Co., bankrupts above named, at the time of the filing of the petition in bankruptcy herein, and the said J. M. Mertens & Co., bankrupts above named, are entitled to a rebate for unearned interest at the time of the filing of the petition in bankruptcy herein in the sum of one hundred fifty-six and 17/100 ($156.17) dollars, leaving due and owing to the said Varick Bank of New York, the sum of twenty-seven thousand five hundred sixty-four and 47/100 ($27,564.47) dollars, and upon which indebtedness no judgment has been rendered; and that the said corporation has not, nor has any person for its order, or to the knowledge or belief of said deponent, for
4 its use, had or received any manner of security for said debt whatever from the said J. M. Mertens & Co.

ADDISON H. DAY. [SEAL.]

Subscribed and sworn to before me, this 9th day of September A. D. 1904.

E. A. DAKIN,
[SEAL.] *Notary Public, Richmond County.*

Certificate filed in New York County.

Original Individual Proof of Debt.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, Individually, Bankrupt.

In Bankruptcy. 1527.

At New York City, in the Southern District of New York, on the 9th day of September, A. D. 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and made oath and says that he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to do business in the City of New York, County and State of New York; that this proof
5 is not made by the treasurer of such corporation for the reason that said corporation has no treasurer and that the affiant is an officer of such corporation and his duties most nearly correspond to those of treasurer, and that he is duly authorized to make this proof; and that the said Jacob M. Mertens against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of twenty-five thousand four hundred eighty-nine and 62/100 ($25,489.62) dollars; that the consideration of said debt is as follows:

That heretofore the said Varick Bank of New York discounted certain promissory notes in writing, copies of which are hereto annexed and made a part hereof, upon which the said Jacob M. Mertens was either the maker or endorser thereof; all of which said notes were so discounted for value received before maturity and of which said Varick Bank of New York is now the lawful owner and holder thereof.

That no part of said debt has been paid; that there are no set-offs or counterclaims to the same, except the sum of six thousand ($6,000) dollars, held by said Varick Bank of New York on deposit and as collateral security at the time of the filing of the petition herein; and that at the time of the filing of the petition in bankruptcy herein said Varick Bank of New York held as security and collateral, property of said bankrupt which property according to the terms of the agreements under which the same was pledged and previous to the date of adjudication and the appointment or election of a trustee herein, were converted into money and from which said Varick Bank of New York realized the sum of ten thousand
6 two hundred and twenty-one ($10,221) dollars, leaving due and owing to said Varick Bank of New York, the sum of nine thousand one hundred eighteen and 37/100 ($9,118.37) dollars from the said Jacob M. Mertens, and upon which indebtedness no judgment has been rendered.

ADDISON H. DAY. [SEAL.]

Subscribed and sworn to before me, this 9th day of September, A. D. 1904. E. A. DAKIN,
[SEAL.] *Notary Public, Richmond County.*

Certificate filed in New York County.

Collateral Note and Agreement of Pledge.

$5,000.00. NEW YORK, N. Y., *April 20th*, 1903.

Four months after date, for value received, the undersigned, jointly and severally promise to pay to the Varick Bank of New York, N. Y., or order, at its Banking Office, 260 West Broadway, N. Y., in funds current through the New York Clearing House, Five Thousand Dollars thereof, as well as for the payment of any other liability or liabilities of the undersigned to the holder of this note, due or to become due, whether now existing or hereafter arising, the following property, viz.:

Insurance Policy No. 417,171 for $50,000.00 in the Equitable Life Assurance Society of New York of a market value estimated by the undersigned at $— and the undersigned agree to deliver
7 to the said holder additional securities to its satisfaction, should the market value of the said securities as a whole, suffer any decline or the Bank at any time deem the securities insufficient, and also hereby give to the said Bank (but to no other holder) a lien for the amount of all the liabilities of the undersigned to it upon all the property or securities given unto or left in the possession of the said Bank by the undersigned and also upon any balance of the deposit account of the undersigned with the said Bank.

On the non-performance of this promise or upon the non-payment of any of the liabilities above mentioned, or upon the failure of the undersigned forthwith, with or without notice, to furnish satisfactory additional securities in case of decline, as aforesaid—then, and in either such case, this note shall forthwith become due and payable, without demand or notice and full power and authority are hereby given to said holder to sell, assign and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the undersigned, for safe keeping or otherwise, at any Broker's Board or at public or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said holder may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to it or
8 him as to it or him shall seem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said holder for any de-

ficiency arising upon such sale or sales. The undersigned do hereby authorize and empower the said Bank (but no other holder) at its option, at any time, to appropriate and apply to the payment and extinguishment of any obligations or liabilities of the undersigned to it, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

1010. J. M. MERTENS & CO.

(Endorsed on the back is the following:)

In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y., its successors, endorsers or assigns, the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender or extension.

J. M. MERTENS & CO.,
J. M. MERTENS.

Protested for non-payment Aug. 20th, 1903.

9 The debt against the copartnership estate consisted of obligations annexed to the proof of claim of which the following is a transcript:

Date.	Due.	Maker.	Endorser.	Am't.
5/15/1903	8/17/03	Cole & Spellman ...	J. M. Mertens & Co.....	$280 61
4/15/1903	8/17/03	do. do. ...	do.	420 29
4/20/1903	8/20/03	J. M. Mertens & Co.	J. M. Mertens & Co. and Jacob M. Mertens.	5,000 00
4/21/1903	8/21/03	Rochester Clothing Co.	J. M. Mertens & Co. and Jacob M. Mertens.	612 03
4/18/1903	8/18/03	G. W. Hydron	J. M. Mertens & Co.....	491 72
4/18/1903	8/18/03	do.	do.	496 31
4/ 1/1903	8/31/03	Clarence H. Spraker.	do.	100 00
7/ 1/1903	9/ 1/03	E. G. Fox & Son....	J. M. Mertens & Co. and Jacob M. Mertens.	126 51
5/ 4/1903	9/ 4/03	J. M. Mertens & Co.	J. M. Mertens & Co. and Jacob M. Mertens.	5,000 00
5/ 8/1903	9/ 8/03	J. Warren Bullen ..	J. M. Mertens & Co. and Jacob M. Mertens.	1,000 00
7/ 1/1903	10/ 1/03	John S. Hough	do. do.	639 05
6/ 2/1903	10/ 2/03	Rochester Clothing Co.	do. do. ...	612 03
7/10/1903	11/10/03	John S. Hough	J. M. Mertens & Co... ..	612 30
7/17/1903	11/17/03	J. M. Mertens & Co.	J. M. Mertens & Co. and Jacob M. Mertens.	5,000 00
7/20/1903	11/20/03	do.	do. do.	5,000 00
8/ 6/1903	12/ 7/03	do. and Jacob M. Mertens.	do. do. and Jennie Mertens.	2,500 00

Of the foregoing obligations representing a part of the claim against both the partnership and individual estates are the following collateral notes all upon the same printed form of contract as that contained in the record.

10 Note dated May 4, 1903, due September 4, 1903, for $5,000 made by J. M. Mertens & Co., and endorsed by J. M. Mertens & Co., and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note dated July 17, 1903, due November 17, 1903, for $50,000 made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note July 20, 1903, due November 20, 1903, made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

Note dated August 6, 1903, due December 7, 1903, made by J. M. Mertens & Co. and Jacob M. Mertens and endorsed by J. M. Mertens & Company, Jacob M. Mertens and Jennie Mertens, depositing as collateral security insurance policies No. 417,171 for $50,000, and No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

All of the remaining obligations are upon the usual form of promissory notes.

The debt against the individual estate consisted of obligations annexed to the proof of claim of which the following is a transcript:

11

Date.	Due.	Maker.	Endorser.	Am't.
4/20/1903	8/20/03	J. M. Mertens & Co.	J. M. Mertens & Co. and Jacob M. Mertens.	$5,000 00
4/21/1903	8/21/03	Rochester Clothing Co.	J. M. Mertens & Co. and Jacob M. Mertens.	612 03
7/ 1/1903	9/ 1/03	E. G. Fox & Son....	J. M. Mertens & Co. and Jacob M. Mertens.	126 51
5/ 4/1903	9/ 4/03	J. M. Mertens & Co.	J. M. Mertens & Co. and Jacob M. Mertens.	5,000 00
5/ 8/1903	9/ 8/03	J. Warren Bullen...	J. M. Mertens & Co. and Jacob M. Mertens.	1,000 00
7/ 1/1903	10/ 1/03	John S. Hough.....	do. do.	639 05
6/ 2/1903	10/ 2/03	Rochester Clothing Co.	do. do.	612 03
7/17/1903	11/17/03	J. M. Mertens & Co.	J. M. Mertens & Co. and Jacob M. Mertens.	5,000 00
7/20/1903	11/20/03	do.	do. do.	5,000 00
8/ 6/1903	12/ 7/03	do. and Jacob M. Mertens.	do. do. and Jennie Mertens.	2,500 00

Of the foregoing obligations representing a part of the claim against both the partnership and individual estates are the following collateral notes all upon the same printed form of contract as that contained in the record.

Note dated May 4, 1903; due September 4, 1903; for $5,000 made by J. M. Mertens & Co., and endorsed by J. M. Mertens & Co., and Jacob M. Mertens depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Noted dated July 17, 1903. due November 17, 1903, for $5,000 made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security in-
12 surance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note July 20, 1903, due November 20, 1903, made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob. M Mertens depositing as collateral security insurance policy No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

Note dated August 6, 1903, due December 7, 1903, made by J. M. Mertens & Co. and Jacob M. Mertens and endorsed by J. M. Mertens & Company, Jacob M. Mertens and Jennie Mertens, depositing as collateral security insurance policies No. 417,171 for $50,000 and No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

All of the remaining obligations are upon the usual form of promissory notes.

13 *Amended Partnership Proof of Debt.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, as Comprising the Copartnership Firm of J. M. Mertens & Co., Bankrupts.

In Bankruptcy. 1527.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersy, and for this an amendment of a proof of debt heretofore filed herein by the Varick Bank of New York makes oath and says:

That he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York and authorized to do business in the City of New York, County and State of New York. That this proof is not made by the treasurer of such corporation for the reason that said corporation
14 has no treasurer, and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof;

and that the said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, as composing the firm of J. M. Mertens & Co., against whom a petition for adjudication of bankruptcy has been filed, were at and before the filing of said petition, and still are, justly and truly indebted to the said corporation in the sum of twenty-seven thousand eight hundred and ninety-three and 85/100 ($27,893.85) dollars. That the consideration of said debt is as follows:

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by Cole & Spellman, dated May 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of two hundred and eighty and 61/100 ($280.61) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by Cole & Spellman, dated April 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and twenty and 29/100 ($420.29) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by G. W. Hydron, dated April 18, 1903, due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and ninety-four and 72/100 ($494.72) dollars. That the said Varick Bank of New York City duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by G. W. Hydron, dated April 18, 1903, and due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and ninety-six and 31/100 ($496.31) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of

the said bankrupts, a certain promissory note in writing made by Clarence H. Spraker, dated April 1, 1903, due August 31, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of one hundred ($100) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

16 That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by John S. Hough, dated July 10, 1903, due November 10, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of six hundred and twelve and 30/100 ($612.30) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and on or about the 20th day of April, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co., and Jacob M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 4th day of September, 1903, and endorsed by the said J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 17th day of

17 November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 20th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York, for a valuable consideration duly

discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, and endorsed by Jennie Mertens, for the sum of two thousand five hundred ($2,500), and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 21st day of April, 1903, and due the 21st day of August, 1903, made by the Rochester Clothing Company, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the
18 lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G. Fox & Son, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one thousand dollars ($1,000) *dollars*. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of October, 1903, made by John S. Hough, and endorsed by J. M. Mertens & Company and J. M. Mertens, individually, for the sum of six hundred and thirty-nine and 5/100
19 ($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the

Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 2d day of June, 1903, and due the 2d day of October, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That no part of said debt has been paid by the said J. M. Mertens & Co. That there are no off-sets or counterclaims to the same, except the sum of one hundred and seventy-three and 21/100 ($173.21) dollars, held by the Varick Bank of New York as a general deposit to the credit of J. M. Mertens & Co., bankrupts above named, at the time of the filing of the petition in bankruptcy herein, and the said J. M. Mertens & Co., bankrupts above named, are entitled to a rebate for unearned interest at the time of the filing of the petition in bankruptcy herein in the sum of one hundred and fifty-six and 17/100 ($156.17) dollars, leaving due and owing to the said Varick Bank of New York the sum of twenty-seven thousand five hundred and sixty-four and 47/100 ($27,564.47) dollars, and upon which indebtedness no judgment has been rendered; and that said corporation has not, nor has any person for its order, or to the knowledge or belief of deponent, for its use had or received any manner of security for said debt from the said J. M. Mertens & Co.

That at the time of the filing of the said petition, the said Varick Bank of New York held as collateral security for the payment of the said debt, which said collateral was deposited by J. M. Mertens, individually, the following described property, to wit:

The sum of six thousand ($6,000) dollars cash held on deposit with the Varick Bank of New York for the individual account of J. M. Mertens, a certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, numbered 417,171 for the sum of fifty thousand ($50,000) dollars and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, numbered 252,314 for the sum of ten thousand ($10,000) dollars.

ADDISON H. DAY, [SEAL.]
Cashier of Varick Bank of New York.

Subscribed and sworn to before me, this 30th day of November, 1904.

HENRY J. DORGELOH,
[SEAL.] *Notary Public, Kings Co.*

21 *Amended Individual Proof of Debt.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, Individually, Bankrupt.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and for this an amendment of a proof of debt heretofore filed herein by the Varick Bank of New York makes oath and says:

That he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to do business in the City of New York, County and State of New York. That this proof is not made by the treasurer of such corporation for the reason that said corporation has no treasurer, and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof; and that the said Jacob M. Mertens,

22 against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said croporation in the sum of twenty-five thousand four hundred and eighty-nine and 62/100 ($25,489.62) dollars. That the consideration of said debt is as follows:

That heretofore and on or about the 20th day of April, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co. and Jacob M. Mertens, individually, for the sum five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 4th day of September, 1903, and endorsed by the said J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 17th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 20th day of July,
23 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co. and J. M. Mertens individually, and endorsed by Jennie Mertens, for the sum of two thousand five hundred ($2,500) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 21st day of April, 1903; and due the 21st day of August, 1903, made by the Rochester Clothing Company, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G.
24 Fox & Son, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

There heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one thousand ($1,000) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 1st day of July, 1903,

and due the 1st day of October, 1903, made by John S. Hough, and endorsed by J. M. Mertens & Company and J. M. Mertens, individually, for the sum of six hundred and thirty-inne and 5/100 ($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

25 That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 2d day of June, 1903, and due the 2d day of October, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That no part of said debt has been paid; that there are no offsets or counterclaims to the same, except the sum of six thousand ($6,000) dollars held by the said Varick Bank of New York on deposit and as collateral security at the time of the filing of the petition herein. That at the time of the filing of the petition in bankruptcy herein, the Varick Bank of New York also held as collateral security, to wit: a certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, numbered 417,171 for the sum of fifty thousand ($50,000) dollars and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, numbered 252,314 for the sum of ten thousand ($10,000) dollars.

That under and by virtue of the terms of the agreement under which the said policies were deposited as collateral with the said Bank, the said Bank was authorized and empowered by the said bankrupt upon default in the payment of the said debt or any part thereof to sell, assign or otherwise dispose of the said collateral security at public or private sale with or without notice to the

26 said bankrupt as is more particularly specified in the said agreement. That in accordance with the said agreement as aforesaid, the said Varick Bank of New York did, prior to the date of the adjudication herein and subsequent to the date of the filing of the petition, convert the said policies into money in accordance with the terms of the agreement under which the same were deposited realizing therefor the sum of ten thousand two hundred and twenty-one ($10,221) dollars, leaving due and owing to the said Varick Bank of New York the sum of nine thousand one hundred and eighteen and 37/100 ($9,118.37) dollars from the said Jacob M. Mertens and upon which said indebtedness no judgment has been rendered.

ADDISON H. DAY, [SEAL.]
Cashier of Varick Bank of New York.

Subscribed and sworn before me, this 30th day of November, 1904.

HENRY J. DORGELOH,
[SEAL.] *Notary Public, Kings Co.*

27 *Objections to Partnership Debt.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Albert K. Hiscock, trustee of the estates of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually, and as composing the co-partnership firm of J. M. Mertens & Co., bankrupts, a person interested in said estate, does hereby oppose and object to the allowance of the claim of Varick Bank of New York, heretofore filed herein, in the amount of $27,-564.47 against the estate of Jacob M. Mertens & Company and its assets, and for grounds of such opposition and objection does file the following specifications:

That said proof of claim does not specify the consideration which claimant gave to the said bankrupt firm for the debt therein
28 set forth, and that said claimant held collateral securities for the payment of said indebtedness, which are not itemized and which are not set forth.

Said claim is further objected to on the ground that at the time of filing the petition in bankruptcy herein, said bank held as collateral security for the payment of $15,000 of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by The Equitable Life Assurance Society of New York, No. 417,171, and that said claimant Bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained, as provided by Subdivision H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the grounds that at the time of the filing of the petition in bankruptcy herein, said Bank held as security for the payment of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by The Equitable Life Assurance Society of New York, No. 252,314, and that said claimant Bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained as provided by Sub-division H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the ground that said claimant has received payment of a part of the notes set forth in said proof of claim made by Cole & Spellman, and has received payment in part of the notes in said proof of claim set forth made by G. W. Hydron,

and has received payment in full of the note in said proof of claim set forth made by Clarence H. Spraker for $100, and has received payment in full of the note set forth in said proof of claim made by E. G. Fox & Son for $125, and has received payment in part of the
29 notes set forth in said proof of claim made by the Rochester Clothing Company, and has received payment in part of the note set forth in said proof of claim made by J. Warren Bullen, and has received payment in part of the notes set forth in said proof of claim made by John S. Hough, and that said payments on said notes are not credited on said claim, or if they are credited, are not itemized and specified, as required by law.

Said claim is further objected to on the ground that J. M. Mertens & Company were not at the time of the filing of said claim indebted to said Varick Bank in said amount of $27,564.47, but that a part of said claim has been paid.

Said claim is further objected to on the ground that certain payments have been credited thereon by J. M. Mertens, individually, and certain credits should have been made thereon on account of collateral securities furnished to said Bank by Jacob M. Mertens for the payment thereof, which have not been applied and on the ground that this claimant has filed a claim against Jacob M. Mertens, individually, on the same indebtedness in this proceeding, in which claim certain credits are allowed upon the said indebtedness of Jacob M. Mertens, which credits are not allowed upon this claim against J. M. Mertens & Co.

Said claim is further objected to on the ground that whatever securities were held by said Varick Bank for the payment of its said indebtedness were required to be liquidated and the value thereof applied upon said indebtedness within one year from September 15, 1903, the date of the adjudication in bankruptcy herein.

That such claim should not be allowed, as appears upon the face thereof, and for the objections heretofore stated.

30 Wherefore, objection is made to the allowance of said claim and a hearing asked thereon.

ALBERT K. HISCOCK, *Trustee.*

UNITED STATES OF AMERICA,
Northern District of New York, County of Onondaga:

I, Albert K. Hiscock, the objecting trustee mentioned and described in the foregoing specifications of objection, do hereby make solemn oath that the statements of fact mentioned therein are true, according to the best of my knowledge, information and belief.

ALBERT K. HISCOCK.

Subscribed and sworn to before me, this 22d day of November, 1904.

PERRY A. WOOD,
Notary Public, Onon. Co., N. Y.

31 *Objections to Individual Debt.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTEN-, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Albert K. Hiscock, trustee of the estates of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually, and as composing the co-partnership firm of J. M. Mertens & Co. bankrupts, a person interested in said estates, does hereby oppose and object to the allowance of the claim of Varick Bank of New York, heretofore filed herein, in the amount of $9,118.37 against the individual estate of Jacob M. Mertens and its assets and for grounds of such opposition and objection does file the following specifications:

That the said proof of claim does not specify the consideration which claimant gave to the said bankrupt for the debt therein
32 set forth, and that said claim does not specify and itemize the securities which the said claimant held or claims to have held for the payment of said indebtedness.

Said claim is further objected to on the ground that at the time of the filing of the petition in bankruptcy herein, said bank held as collateral security for the payment of $15,000 of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by The Equitable Life Insurance Society of New York, No. 417171, and that said claimant bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained as provided by Subdivision H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the grounds that at the time of the filing of the petition in bankruptcy herein, said bank held as security for the payment of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by the Equitable Life Assurance Society of New York, No. 252,314, and that said claimant Bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained as provided by Subdivision H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the ground that said claimant has received payment of the note set forth in said proof of claim made by E. G. Fox & Son, for $125 and interest and on the ground that said claimant has received payment in part of the notes in said proof of claim set forth, made by the Rochester Clothing Company, J. Warren Bullen and John S. Hough, and that said payments on said notes are not credited on said claim, or if they are credited, are not itemized and specified, as required by law.

It is also denied, on information and belief, that the said
33 Varick Bank held $6,000 on deposit as collateral security to said indebtedness at the time of the filing of the petition herein.

Said claim is further objected to on the ground that whatever securities were held by said Varick Bank for the payment of its said indebtedness were required to be liquidated and the value thereof applied upon said indebtedness within one year from September 15, 1903, the date of the adjudication in bankruptcy herein.

That such claim should not be allowed, as appears upon the face thereof, and for the objections heretofore stated.

Wherefore, objection is made to the allowance of said claim and a hearing asked thereon.

ALBERT K. HISCOCK, *Trustee.*

UNITED STATES OF AMERICA,
Northern District of New York, County of Onondaga, ss:

I, Albert K. Hiscock, the objecting trustee mentioned and described in the foregoing specifications of objection, do hereby make solemn oath that the statements of fact mentioned therein are true, according to the best of my knowledge, information and belief.

ALBERT K. HISCOCK.

Subscribed and sworn to before me, this 22d day of November, 1904.

PERRY A. WOOD,
Notary Public, Onon. Co., N. Y.

34 *Record of Proceedings Before Referee and His Ruling.*

In the United States District Court, for the Northern District of New York.

In the Matter of JACOB M. MERTENS and Others.

DECEMBER 1ST, 1904—at 11 a. m.

Hearing before the Referee upon:

1st. Secured claim of the Varick Bank of New York against Jacob M. Mertens, individually, for $9,118.37, the balance alleged to remain unpaid of a former larger claim;

2d. Unsecured claim of the Varick Bank of New York against Jacob M. Mertens and others, as co-partners, for $27,564.47.

Appearances.

Mr. Czaki, of Fried & Czaki, 11-19 William Street, New York City, for the Claimant;

Messrs. Lewis & Crowley, Syracuse, N. Y., for the Trustee.

Adjourned to 2.30 p. m.

35 2.30 p. m.

Amended proofs of claim, verified November 30th, 1904, of the Varick Bank of New York against the co-partnership firm of J. M. Mertens & Company, and J. M. Mertens, individually, are filed by Mr. Czaki, and are received by the Referee without objection from the Trustee, subject to the right of the Trustee to file amended objections to the claims should he think proper, within five days from date, otherwise the original objections stand as objections to the amended claim.

First. It is mutually conceded by the respective parties that prior to or on the 14th day of September, 1903, the Varick Bank gave to its attorneys, Messrs. Fried & Czaki, policies Nos. 417,171 and 252,-314, issued by the Equitable Life Assurance Society upon the life of Jacob M. Mertens.

Second. Likewise conceded, that prior to or on the 14th day of September, 1903, and prior to the sale thereof, Frederick M. Czaki handed said policies to one Samuel Goldsticker, duly licensed auctioneer, with instructions to sell the same at public auction at the New York Real Estate Sales Rooms in the City of New York, Borough of Manhattan, and that on the said 14th day of September, 1903, at 2 p. m. thereof the said policies were offered for sale at said New York Real Estate Sales Rooms, to the highest bidder, by said Samuel Goldsticker, auctioneer.

Third. Likewise conceded, that no notice of said sale was given to any one except said Varick Bank.

Fourth. That on said 14th day of September, 1903, at 2 p. m. thereof, the said policies were offered for sale by said Samuel
36 Goldsticker, auctioneer. That there was only one bid made which was for the sum of $10,250, made by said Czaki, and which bid was made in the name of Herbert M. Delanoie, who was not present at said sale. Said policies were sold separately; policy No. 417,171 was sold for the sum of $7,000, and policy No. 252,314 was sold for the sum of $3,250.

Fifth. That said Varick Bank of New York had instructed said Czaki that should he purchase said policies, to do so in the name of said Delanoie.

Sixth. That said Varick Bank of New York prior to said sale, made its check on the Western National Bank, to its own order for the amount as therein stated, which said check said Varick Bank's cashier cashed in bills, which bills were thereupon handed to said Czaki. Said check is herewith offered and received in evidence (marked Exhibit J).

Seventh. It is likewise conceded that said Czaki gave said money to said auctioneer after the sale of the said policies, and that the auctioneer's fees were $29.

Eighth. Likewise conceded, that after said sale the said auctioneer gave said Czaki his certified check for $10,250 to the order of the Varick Bank, which check was delivered to the said Bank by said Czaki.

Ninth. Likewise conceded, that the papers marked Exhibits A, B, C and D are copies of the originals, and are received in evidence

with the same force and effect as though originals, said exhibits being the bills of sale executed respectively by the Varick Bank of New York, and Samuel Goldsticker, auctioneer, upon the sale of
37 the said policies.

Tenth. Likewise conceded, that on September 17th, or thereabouts, said Herbert M. Delanoie received said assignments and policies and obtained a loan thereon from the Knickerbocker Trust Company of $10,250, which amount on that day said Delanoie delivered to the Varick Bank.

Eleventh. Likewise conceded, that said policies were bid in for said Varick Bank at said sale, and that whatever title was acquired at said sale by said Delanoie was taken for it, and that said Delanoie ever since has and still holds said policies for said Varick Bank subject to the rights of the Knickerbocker Trust Company therein, to the extent of said loan for $10,250, and the further sum of $2,622.75 since loaned thereon with interest.

Twelfth. Likewise conceded that Exhibits E and F are copies of assignments relating to said policies which were delivered to said Bank at or about the times of their respective dates, which copies may be received in evidence with the same force and effect as the originals thereof, being assignments on the blank forms furnished by the Equitable Life Assurance Society.

Thirteenth. It is conceded that during the years 1901 and a portion of 1902, J. Maus Schermerhorn was the President of the Varick Bank of New York, and he was immediately succeeded by John T. Sproull as President of said bank. There has since been no other president.

Fourteenth. That on August 19th, 1903, said Varick Bank had actual notice that a receiver in bankruptcy of J. M. Mertens
38 & Company and of its individual members had been appointed.

Mr. CZAKI: I ask the Court to allow the claims of the Varick Bank of New York as filed upon the records and documents in evidence.

Mr. CROWLEY: I move for the disallowance of both of the claims on the ground that the claims have not been properly proved; that the value of the securities set forth in the claims has not been proved and no evidence from which that value can be ascertained and found by the Court has been given so as to establish the balance.

Adjourned to December 2nd, at 10 a. m.

DECEMBER, 2ND, 1904, 10 a. m.

Same Appearances.

Fifteenth. It is likewise mutually conceded that Exhibits G and H offered in evidence and received, are correct copies of the originals, and are received with the same force and effect as though originals, being policies No. 417,171, Exhibit G, and policy No. 252,314, Exhibit H.

Sixteenth. It is likewise mutually conceded that Exhibit I is a correct copy of an assignment of policy No. 252,314, executed by Jennie

Mertens and others, which was delivered to said bank at or about the time of its date, and is received in evidence.

Mr. CZAKI: The attorney for the creditors requests to know of the attorney for the trustee whether he rests his case under the objections as filed.

Mr. CZAKI: I move that the Referee decide that the burden
39 of proof in the proceedings is upon the trustee, not having received any response to my question as to whether he had rested.

The REFEREE: I think that the transaction of September 14th, through the auctioneer, consum-ated in the bills of sale referred to in the 9th concession, under all the concessions made, was not such a sale of the insurance policies or either of them, as would have barred the right of the bankrupt under the assignments of the policies, Exhibits E and F read in connection with the agreements made upon the notes, the contents of which are showin in the proofs of claim, to redeem the same upon payment of his indebtedness secured thereby. I do not think that the sale was a public sale in any fair interpretation of that phrase. It appears that the policies are still held for the Varick Bank, and the transaction appears to me upon all the concessions here, to have no more significance than it would have had the Varick Bank, in form and with knowledge of the fact that bankruptcy proceedings were pending against its creditor, in which a receiver has been appointed, executed to itself, an absolute assignment of title to the policies. The trustee insists that the policies and each of them, have in fact, a larger commercial value than the amount proposed to be credited by the Varick Bank upon its claims secured thereby. Such a claim appears to be justified by the terms of the policies themselves. Whatever may be true with respect to the right of the bankrupt or of the trustee to redeem the policies, and whether or not any such right exists, need not be now determined. The creditor, the Varick Bank, is now in this Court still holding these policies, acquired in connection with certain loans, and seeking the aid of this Court in the collection of the balance of its claims which shall not be paid in full out of these policies. Before the creditor is entitled to that relief from this Court, it should satisfy
40 this Court that the full value of the security held by it has been credited or will be, upon the total amount of its claims to which the same applies. I am not satisfied that such full value has been applied by or through the transaction shown as the disposition of the policies in form of a sale to Mr. Delanoie. As the claim against the co-partnership includes the notes set out in the claim against J. M. Mertens individually, I will reserve the question as to the allowance against the co-partnership for a subsequent determination.

As the proof now stands, I shall, therefore, decline to allow either claim as established against the estate or estates. The claimant may, however, if it so wishes, offer further evidence with the view of establishing the value of the policies referred to which should be credited or allowed upon its claims against the bankrupt estates.

Mr. CZAKI: Then, as I understand it, we have the right to intro-

duce further evidence upon either of these claims, if we so desire, and that your Honor's decision is without prejudice to that right?

The REFEREE: Yes, you may proceed with any further evidence upon the subject, without prejudice to your right to review this decision as a preliminary question.

The REFEREE: The claimant may have a certificate of review of my decision.

Mr. CROWLEY: I think at this time I ought to make a motion that the Court, under Subdivision H of 57, direct a method in which this security be liquidated, and that in so doing, he direct the creditor to resell the policies upon notice to the trustee.

Mr. CZAKI: I object to the motion; not a proper part of the present proceeding; that the Court is without power or jurisdiction to grant the motion or consider it; that it calls for the deprivation of the property of the Varick Bank of New York under the terms of the contract and the proceedings which they have taken in pursuance of that contract, and depriving them of their property without due process of law. That no notice of this motion has been given to the Varick Bank or to its attorneys, and that it is not made in accordance with the practice, or rules or provisions of the Act of Congress relating to bankruptcy.

41

The REFEREE: I will reserve my decision upon the motion of the trustee until counsel for the claimant shall conclude as to a review of this decision.

Adjourned to Monday, December 19th, at 11 a. m.

MONDAY, *December* 19, 1904—11 a. m.

By the REFEREE:

I will grant the motion made by the attorney for the trustee. It appears to me that a proper method of liquidation in this case would be for the creditor to make a public sale of the policies he holds upon notice to the Trustee sufficient so that the trustee in turn may notify the creditors. The sale should be upon notice to all parties appearing to have any interest in the policies, including the Insurance Company itself. If counsel fail to agree upon a proper time and place for such a sale, I will appoint such time and place upon application of either party on five days' notice to the other. An order may be entered accordingly, and an exception noted to this ruling and to the order in favor of the Varick Bank, the creditor.

42 *Opinion of District Judge Affirming Referee's Ruling.*

In the District Court of the United States, Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, EDMUND A. MERTENS, and ERNEST T. MERTENS, Individually and as Co-partners, Composing the Firm of "J. M. Mertens & Co.," Bankrupts.

This is the review of orders of C. L. Stone, Esq., Referee in Bankruptcy, refusing to allow two certain amended claims presented by the Varick Bank of the City of New York, one for $27,564.47 against the firm or co-partnership of J. M. Mertens & Co., and the other for $9,118.37 against J. M. Mertens, a member of said co-partnership, individually. The claim of said bank against the firm is founded in the main on the notes of said Company indorsed by said J. M. Mertens, and notes given to said firm by different parties and indorsed by the firm and said J. M. Mertens (second indorser), all discounted at said Varick Bank by said firm. The claim
43 against J. M. Mertens individually is founded on his liability on said indorsements and his liability as signer of one or more of the notes as maker with the company.

The bank held certain collateral which it claims to have converted into cash and applied to the payment of the claim against J. M. Mertens. Six thousand dollars of this collateral was a deposit in said Varick Bank standing to the credit of J. M. Mertens individually. The balance of the collateral consisted of two life insurance policies upon the life of said J. M. Mertens, one for $50,000 and the other for $10,000. The Bank claims that it lawfully disposed of such policies for $10,221.00 pursuant to the contract under which held and applied the proceeds, with such deposit of $6,000.00, on the claim against said J. M. Mertens (asserting that he owned and pledged the collateral) and that they may prove and have allowed the debt arising on these notes to the full amount against the firm or co-partnership, and for the full amount less such credits ($6,000.-00 and $10,221.00 against the indorser, J. M. Mertens.

Objections having been filed by the trustee to the allowance of each claim, mainly on the ground that the value of such collateral had not been properly ascertained or credited; that the value of the policies has not been ascertained as provided by Subdivision H, Section 57 of the Bankruptcy Act, the Referee disallowed both claims as matters stand and made an order prescribing a method for ascertaining the value of such policies.

Fried & Czaki, for claimant, Varick Bank.
Lewis & Crowley, for the Trustee.

RAY, *District Judge:*

It is insisted by the Varick Bank that the policies of insurance were the property of J. M. Mertens individually, the co-partnership

having no interest therein, and that, hence, the claim against
44 J. M. Mertens & Co. was not a secured claim.

The trouble with this contention is the — amended claim does not so show or state, and in one note at least the policies are pledged in writing by the firm as well as by J. M. Mertens as owner. As such policies were assignable this Court will not assume they were owned solely by J. M. Mertens individually.

By Subdivision 23 of Section 1 of the Act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, it is provided:

"'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

It does not appear and this Court will not assume that the firm did not own at least an interest in these policies when upon the face of one of the notes as it appears that the company pledged them as security for one of the notes in question.

If the Varick Bank relies upon the assignments, made by Jacob M. Mertens and Jacob M. Mertens and wife, of the policies in question, then we find in such assignments no agreement for the sale of such policies in the mode and manner they were disposed of by the Bank. But however this may be, it is evident to the Court that the Referee was correct in refusing to allow these claims. Between the date of the filing of the petition and the date of the adjudication the Varick Bank, without notice to any one, delivered these policies to one of its agents or attorneys with instructions to sell the
45 same at public auction at the New York Real Estate Sales Rooms in the City of New York, and on the same day that said policies were thus delivered to the attorney or agent, the designated attorney offered said policies for sale at said place to the highest bidder. No notice of said proposed sale was given to any person except the Bank and as it was doing the selling no notice to the Bank was required. Only one bid was made, which was for the sum of $10,350.00, made by an attorney for the Bank in the name of another representative of the Bank, and payment was made to the auctioneer by this purchaser with money furnished by the Varick Bank prior to his going to the sales rooms, and strange to say, the Bank had furnished the attorney the exact amount of money for which the policies were sold. This attorney of the Bank took the policies into his possession, but it is conceded that he was acting for the Bank, used the money of the Bank to pay for the policies and thenceforth held the policies for the Bank, except that he procured a loan of the Knickerbocker Trust Company upon the strength of said policies for $10,250.00 and subsequently for the further sum of $2,622.75. The loan procured of the Knickerbocker Trust Company for $10,250.00 was delivered to the Varick Bank and was evidently procured for that Bank. I find no statement as to what was done with the $2,622.75 since loaned on the strength of said policies by the Knickerbocker Trust Company.

It is evident that the Varick Bank, on learning of the filing of the petition in bankruptcy, took advantage of the situation to get possession of these policies as owner without making a fair, honest, open public sale, if it purposed to sell at public sale, and without any attempt to make a fair, honest private sale of the policies. The Bank made no effort whatever to ascertain the true value of these policies. It did not attempt to sell them to any per-
46 son at private sale. It purported to sell at public auction. There is no pretence that at this sale made at the Real Estate Sales Rooms any information was given to the bystanders, if any there were, as to the age or situation of the insured or the nature or character of the policies. It does not appear that even the amount was stated. A public sale under the agreement contained in the notes presupposes a fair, honest public sale; a sale under such conditions that persons present who might desire to purchase would have some understanding of the nature or character and value of the property offered. There was no bidder except the Varick Bank, and it took the policies at the precise sum it had handed its attorney when the direction was given for the sale to be made. This Court has no hesitancy in declaring this transaction fraudulent. The purpose of the Bank in carrying through this sham sale was to get possession of these policies as absolute owner at its own price, if possible, under the pretence of a sale, the effect of which would be to defraud the creditors of the bankrupts, J. M. Mertens and J. M. Mertens & Co. Such a transaction ought not to be sanctioned, and this Court refuses to sanction or approve it. The Referee states, in substance, that the transaction was the same as if the Varick Bank had said we will take these policies at a certain sum of money and credit that sum on the indebtedness. This is putting the case mildly. While it is true that it was a fixing of the sum by the Bank that the Bank was willing to credit on the indebtedness for the policies, which would have been an honest transaction even if not a legal sale of the policies or a compliance with the terms of the agreement under which held, the transaction as it actually occurred was more than that and was intended to be more. It was intended to be a mere formal compliance with the terms of the agreement under
47 which the policies were pledged as collateral security without being in fact a compliance therewith. The intent and purpose was to transfer the absolute title to the Bank and cut off all right of redemption without notice to any of the interested parties under the mere form and pretence of a public sale. The Bank knew and the attorneys conducting the proceedings must have known that the transaction did not measure the value of the policies by a public sale thereof. This transaction did not constitute a compliance with the terms of the agreement under which the Bank held the policies as collateral.

There is still another view to be taken of this transaction. As between the Bank and J. M. Mertens it is conceded that the Bank was a secured creditor. Subdivision H of Section 57 of the Bankruptcy Act provides:

"The value of securities held by secured creditors shall be de-

termined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the Court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

It is evident that the Act contemplates a determination of the value of securities held by secured creditors in one of two ways—either by converting the same into money according to the terms of the agreement, pursuant to which such securities were delivered to such creditors, or by the joint action of the creditors and trustee, pursuant to an agreement, arbitration, compromise or litigation entered into by them, and that the Court may direct the ascertainment
48 of the value of such securities in either manner. It does not lie with the secured creditors to dispose of the securities to himself at a price fixed by himself under the pretence of a sale, public or private, and then say the value has been fixed by a public or private sale to himself, and the Court has nothing further to say regarding the transaction. The Court thinks the Bank is in error and that the Referee was right and that the Court has power to direct the determination of the valuation of these policies by either a public or private sale under such circumstances, and after such inquiry and notice as shall guarantee, to some extent at least, that a fair valuation has been arrived at.

This pretended sale took place between the filing of the petition and the date of the adjudication. The filing of a petition in bankruptcy is a *caveat* to all the world and operates as an attachment and an injunction. From the filing of the petition unto the adjudication the property rights of the debtor are in abeyance.

Bank *v.* Sherman, 101 U. S., 406.
Mueller *v.* Nugent, 184 U. S., 1.

Suits against a bankrupt, if founded on a claim from which a discharge would be a release, are to be stayed until after the adjudication, and in Bank *v.* Sherman, *supra,* the Court said:

The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. * * * Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at their peril."

49 The provisions in the notes giving the Bank the right to sell at public or private sale without notice, &c., were intended to furnish a remedy to the Bank. Without impairing the obligation of the contract it was perfectly competent for the act to suspend the exercise or enforcement of these remedies until after the adjudication. The act has done this and hence these acts of the Varick Bank, constituting the pretended sale of the policies in question, were in violation of the act and void. Conceding, for the sake of argument, that the Bank might sell at public or private sale after adjudication, even without notice, it could not so sell before adjudication.

In the opinion of the Court the exercise of the power of sale by the Bank was and is subject to the supervision and control of the Court. While it would not deprive the Bank of its right to have the value of these policies determined under the provisions of the contract, it has the power and should see to it that the Bank exercises those powers honestly, fairly, justly and in such a manner as to honestly determine with reasonable certainty the actual value of the securities in question.

The orders of the Referee disallowing the claims are approved and affirmed.

50 *Order Appealed From.*

At a Stated Term of the District Court of the United States, for the Northern District of New York, held at the Court House in the City of Utica on the 21st day of January, 1905.

Present—Honorable George W. Ray, Judge.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, EDMUND A. MERTENS, and ERNEST T. MERTENS, Individually and as Copartners, Composing the Firm of "J. M. Mertens & Co.," Bankrupts.

A petition having been filed herein by the Varick Bank of New York, verified the 12th day of December, 1904, praying that the rulings of Charles L. Stone, Esq., Referee, made herein on the 2nd day of December, 1904, be reviewed by this Court for reasons of error in law and in fact, and due notice of the hearing upon said petition for review having been duly given, now, upon all the proceedings had herein, the claims and amendments thereto filed by the Varick Bank of New York, the objections to the said claims filed by the Trustee, the proceedings had before the said Referee on
51 the 1st and 2nd days of December, 1904, the said petition for review, the evidence and several exhibits therein referred to, taken before the said Referee, all duly certified by the said Referee to this Court;

After hearing Frederick M. Czaki, of counsel for the Varick Bank of New York, claimant, in support of the petition of review that the ruling of the said Referee be vacated, set aside and the claims of the said Bank allowed as filed, and Messrs. Lewis & Crowley, of counsel for the Trustee, in opposition thereto, and due deliberation having been had, it is

Ordered, that the ruling of the said Referee rendered herein on the 2nd day of December, 1904, be and the same hereby is, in all respects and things, approved and affirmed; and it is

Further ordered, that the said Varick Bank of New York may review this order by certiorari or appeal, without prejudice to the right of the said Varick Bank of New York to introduce such further and other evidence as it may be advised before the said Referee.

Dated this 21st day of January, 1905.

GEORGE W. RAY,
U. S. Judge.

52 *Notice of Appeal.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts; THE VARICK BANK OF NEW YORK, a Creditor, Appellant, and ALBERT K. HISCOCK, Trustee, Appellee.

SIRS: You will please take notice that the Varick Bank of New York, a creditor of the above-named bankrupts, conceiving itself aggrieved by the order made and entered in the above-entitled proceeding on the 21st day of January, 1905, hereby appeals from so much of the said order as in all respects and things affirms the ruling of Charles L. Stone, Esq., Referee, refusing to allow the claims of the Varick Bank of New York as filed against the estates of the above-named bankrupts, for the reasons and upon the grounds more particularly specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said
53 order was made, duly authenticated, may be filed and sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, January 21st, 1905.

Yours, etc.,

MESSRS. FRIED & CZAKI,
Solicitors for the Varick Bank of New York, Creditor.

Office and Post Office Address, 11 William Street, Borough of Manhattan, New York City.

To Messrs. Lewis & Crowley, Solicitors for Albert K. Hiscock, Esq., Trustee, White Memorial Building, Syracuse, New York. William S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York.

The foregoing appeal is allowed.

Dated New York, January 21st, 1905.

GEO. W. RAY,
Judge of the District Court of the United States for the Northern District of New York.

54 *Citation.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts.

In Bankruptcy.

UNITED STATES OF AMERICA, *ss:*

To Albert K. Hiscock, Trustee:

Your are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit, to be held in the Federal Court House, in the Post Office Building, in the City of New York, Borough of Manhattan, on the 23d day of February, 1905, pursuant to an appeal from the District Court of the United States for the Northern District of New York, wherein the Varick Bank of New York, a creditor of the above-named bankrupts, is the appellant, and you are the appellee, to show cause, if any there be, why the order passed against the said Varick Bank of New York, as a creditor as aforesaid, should not be reversed and speedy justice done to the parties in its behalf.

Witness: Honorable George W. Ray, Judge of the United States
55 District Court for the Northern District of New York, at the Court House, in the Post Office Building, in the City of Utica, State of New York, on the 21st day of January, in the year of our Lord one thousand nine hundred and five.

GEO. W. RAY,
District Judge.

Service of the foregoing citation is hereby admitted.
Dated New York, January — 1905.

____ ____,
Solicitors for Appellee.

Assignments of Error.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts; VARICK BANK OF NEW YORK, a Creditor, Appellant; ALBERT K. HISCOCK, Trustee, Appellee.

And now comes the Varick Bank of New York, a creditor of the above-named bankrupts, by its solicitors, Messrs. Fried & Czaki, and says and avers:

That the order made and entered in this cause on the —
56 day of January, 1905, is an erroneous one, and against its rights as a creditor, and in violation of the provisions of the Acts of Congress relating to bankruptcy, in this, to wit:

First. That the District Court of the United States, for the Northern District of New York, erred in refusing to allow the claims filed by the Varick Bank of New York against the estate of Jacob M. Mertens, individually, and against the estate of J. M. Mertens & Company, in ruling that the said appellant did not, by the presentation of the said claims and the testimony taken in reference thereto, establish its right to the allowance of said claims as filed.

Second. That the District Court of the United States, for the Northern District of New York, did further err in refusing to allow the claim against the co-partnership estate of J. M. Mertens & Company as filed, in that the said claim was proved as an unsecured claim. That it did appear from all of the proofs and proceedings had that the security held by the said appellant was not property of the bankrupt estate of J. M. Mertens & Company, or such property of the bankrupt estate of J. M. Mertens & Company as is within the purview of the Acts of Congress relating to bankruptcy; and in ruling that it did not affirmatively appear that the said property so held by the said appellant was the property of Jacob M. Mertens individually.

Third. That the United States District Court, for the Northern District of New York, did further err, in that it refused to allow the claim of the appellant filed against the individual estate of Jacob M. Mertens, ruling that the sale of the securities, as disclosed by the proceedings had herein, did not bar the right of redemption
57 of the said Jacob M. Mertens in and to the said securities, and that the value of the said securities was not ascertained as provided by the provisions of Section 57, Sub-division *h*, of the Acts of Congress relating to bankruptcy.

Fourth. That the said District Court of the United States, for the Northern District of New York, did further err, in that it refused to allow the claims filed by the appellant, against the estates of the bankrupts above named, ruling that the sale of the said securities by the said appellant, in the manner as disclosed by the record of the proceedings herein, was not a valid exercise of the power granted by the said Jacob M. Mertens, in the agreements under which the same were pledged, and did not bar the said Jacob M. Mertens' right of redemption in and to the said securities so held by the said appellant.

Fifth. That the said District Court of the United States, for the Northern District of New York, did further err in refusing to allow the claims of the said appellant filed against the estates of the bankrupts above named, in that it did, contrary to the provisions of the Acts of Congress relating to bankruptcy, and contrary to the settled law of the land, hold that the said appellant was without power or right to do any act or thing in pursuance of the terms of the contracts under which the said securities were pledged to it, by reason of the fact that a petition in bankruptcy had been filed and a receiver appointed by the said District Court prior to the disposition of said securities by the said appellant, and that the said appellee, by virtue of his subsequent appointment and qualification as Trustee, became vested, by operation of law or otherwise, with greater
58 rights in and to the said securities than were possessed by the bankrupt, Jacob M. Mertens, as of the date he was adjudicated a bankrupt.

Sixth. That the said District Court of the United States, for the Northern District of New York, did further err, in that it did refuse to allow the claims of the said appellant against the estates of the bankrupts above named, holding that the sale and disposition of the said securities in the manner and upon the facts as disclosed by the record of the proceedings had before the Referee was fraudulent, that the sale thereof was a sham, and for the purpose of defrauding the creditors of the said bankrupts.

Seventh. That the said District Court of the United States, for the Northern District of New York, did further err, in that it did refuse to allow the claims against the estates of the bankrupts above named, ruling that the sale and disposition of the said securities, as disclosed by the record herein, was a mere formal compliance with the terms of the agreements under which the said securities were pledged, without in fact being a compliance therewith; that the said sale and disposition of the said securities, as aforesaid, did not establish and measure the value of the said securities, and that the value of the said securities was not ascertained in accordance with the terms and provisions of the agreements under which they were pledged to the appellant.

Eighth. That the said District Court of the United States, for the Northern District of New York, did further err, in that it did refuse to allow the claims of the said appellant against the estates of the said bankrupts, ruling that the filing of the petition in bankruptcy
59 was tantamount to an injunction and restrained and enjoined the said appellant from in any manner disposing of the said securities until the final adjudication in said bankruptcy proceedings; that the sale and disposition of the said securities, as disclosed by the record of the proceedings herein, was in violation of the right of the appellee, and in violation of the terms and provisions of the Acts of Congress relating to bankruptcy, and in that whatever rights were acquired by the said appellant, under and by virtue of the terms and provisions of the agreements under which the said securities were pledged to it, were suspended, not enforceable, and held in abeyance by virtue of the filing of the petition in bankruptcy and the appointment of said appellee.

Wherefore, for these and divers other good and sufficient reasons, too numerous to be specified, said appellee prays that the said order may be reversed, and that the said claims of the said appellant as filed be allowed, and the District Court, for the Northern District of New York, be directed to allow said claims as filed; and that the said appellant may have such other and further relief as to this Honorable Court may in good conscience seem just and proper.

Dated New York, January 21st, 1905.

FRIED & CZAKI,
Solicitors for Appellant.

Office and P. O. Address, 11-19 William Street, New York City, Borough of Manhattan.

60 EXHIBIT A.

Bill of sale by Varick Bank of New York to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 417171 in the Equitable Life Assurance Society of the United States for the sum of $50,000. Recites that said policy was sold by Samuel Goldsticker, auctioneer, at public sale to the highest bidder at the New York Real Estate Salesrooms for -7,000.00 on September 14, 1903. Bill of sale dated September 17, 1903, and acknowledged same day.

EXHIBIT B.

Bill of Sale by Samuel Goldsticker, auctioneer, to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 417171 in the Equitable Life Assurance Society of the United States for the sum of $50,000. Recites that said policy was sold at public auction to the highest bidder at the New York Real Estate Sales Rooms September 14, 1903, for $7,000.00. Bill of sale dated September 16, 1903, and acknowledged same day.

EXHIBIT C.

Bill of Sale by Varick Bank of New York to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 252314 in
61 the Equitable Life Assurance Society of the United States for the sum of $10,000. Recites that said policy was sold by Samuel Goldsticker, auctioneer, at public auction to the highest bidder at the New York Real Estate Salesrooms for $3,250, on September 14, 1903. Bill of sale dated September 17, 1903, and acknowledged same day.

EXHIBIT D.

Bill of sale by Samuel Goldsticker, auctioneer, to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 252314 in the Equitable Life Assurance Society of the United States for the sum of $10,000. Recites that said policy was sold at public auction to the highest bidder at the New York Real Estate Sales Rooms, September 14, 1903, for $3,250.00. Bill of sale dated September 16, 1903, and acknowledged same day.

EXHIBIT E.

Form for Assignment of Policy as Collateral Security.

To be attached to and retained with the policy for use as evidence when required.

For and in consideration of the sum of One Dollar to me in hand paid by Varick Bank of New York, whose P. O. Address is 260 West Broadway, New York, the receipt whereof is hereby acknowledged, and for securing the money hereinafter mentioned, I hereby sell, assign, transfer and set over unto the said Varick Bank of New
York, Policy No. 417171, issued by The Equitable Life As-
62 surance Society of the United States, on the life of Jacob M.
Mertens, of Syracuse, N. Y., with all right, title and interest therein, together with all moneys which may be now due or hereafter payable thereunder and all dividends, benefits, options and advantages to be derived therefrom, including the right to surrender said policy and to receive the surrender value thereof, accounting to the assignor for any surplus which may be realized over and above the amount due upon said loan.

And for the above consideration I do also for my executors and administrators guarantee the validity and sufficiency of the foregoing transfer and pledge of said policy to said assignee, executors, administrators or assigns; and their title thereto will forever warrant and defend.

Upon condition that this assignment shall be void, and the interest of the assignee released, upon the repayment of the sum of Fifteen Thousand Dollars to the said Varick Bank of New York, to secure which this pledge is made, and after notice of such repayment is given to said Society in writing.

In witness whereof, I have hereunto set my hand and seal this twenty-first day of March, 1901.

JACOB M. MERTENS.

In presence of,
K. L. O'REILLY.

STATE OF NEW YORK, *County of Onondaga:*

On this twenty-first day of March, in the year of our Lord 1901, before me personally came Jacob M. Mertens, to me known and known to me to be the individual described in and who executed
the foregoing assignment, and acknowledged that he exe-
63 cuted the same.

PERRY A. WOOD,
Notary Public, Onon. Co., N. Y.

MARCH 22D, 1901.

Received from George H. Dallon, policy 417171 for $50,000, on life of J. M. Martens, in Equitable Life Assurance Co., of New York, together with receipts to Feb'y 15/00 and the assignments and re-

leases to date, including the last assignment under date of March 21st, 01, to Varick Bank of New York, which assignment is now in force.

VARICK BANK OF NEW YORK.
J. MAUS SCHERMERHORN,
President.

EXHIBIT F.

Form for Assignment of Policy as Collateral Security.

To be attached to and retained with the policy for use as evidence when required.

For and in consideration of the sum of One Dollar to me in hand paid, by the Varick Bank of New York, whose P. O. address is 260 West Broadway, the receipt whereof is hereby acknowledged, and for securing the money hereinafter mentioned, I hereby sell, assign, transfer and set over unto the said Varick Bank of New York, Policy No. 252314 issued by The Equitable Life Assurance Society of the United States, on the life of Jacob M. Mertens, with all right, title and interest therein, together with all moneys which may be
64 now due or hereafter payable thereunder and all dividends, benefits, options and advantages to be derived therefrom, including the right to surrender said policy and to receive the surrender value thereof, accounting to the assignor for any surplus which may be realized over and above the amount due upon said loan.

And for the above consideration I do also for my executors and administrators, guarantee the validity and sufficiency of the foregoing transfer and pledge of said policy to said assignee, my executors, administrators or asigns; and their title thereto will forever warrant and defend.

Upon condition that this assignment shall be void, and the interest of assignee released, upon the repayment of the sum of Five Thousand Dollars to the said Varick Bank of New York, to secure which this pledge is made, and after notice of such repayment is given to said Society in writing.

In witness whereof I have hereunto set my hand and seal, this twenty-fifth day of March, 1901.

JENNIE MERTENS.

In the presence of
JACOB M. MERTENS.

STATE OF NEW YORK, *County of Onondaga:*

On this twenty-fifth day of March in the year of our Lord 1901, before me personally came Jennie Mertens, to me known and known to me to be the individual described in and who executed the foregoing assignment, and acknowledged that she executed the same.

MARCUS B. RATHBUN,
Notary Public.

65 EXHIBIT G.

The Equitable Life Assurance Society of the United States.

Premium.	Amount.
$1,735.00.	$50,000.
Age 42.	No. 417171.

(Copy.)

120 Broadway, New York.

President:
Henry B. Hyde.
George W. Phillips, Actuary.
J. G. Van Cise, Assistant-Actuary.
S. D. Ripley, Cashier.
William Alexander, Secretary.
Thomas D. Jordan, Assistant-Secretary.
Edward A. Pearson, 2d Assistant Sec'y.
James B. Loring, Registrar.
James W. Alexander, Vice-President.
Samuel Borrowe, Second Vice-President.
Edward W. Scott, Third Vice-President.

In Consideration of the Application fot this Policy of Insurance, and of each of the statements made therein; And in further consideration of the payment of the sum of seventeen hundred and thirty-five dollars and —— cents, at the office of the Society in the Ctiy of New York, at the date hereof, and of the annual payment of seventeen hundred and thirty-five dollars and —— cents, to be made at the said office, on or before the fifteenth day of February, in every year, during the continuance of this contract:

Does Promise to Pay to Jacob M. Mertens, his executors, administrators or assigns, the sum of Fifty Thousand dollars, (any indebtedness to the Society on account of this contract to be first deducted therefrom), at the Office of the Society, in the City of New
66 York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens of Syracuse in the County of Onondaga, State of New York, shall have been furninshed to the Society at its said office.

And the said Society does hereby further Promise and Agree that after two years from the date hereof, the only conditions which shall be binding upon the holder of this Policy are that he shall pay the premiums, at the times and place, and in the manner herein stipulated, and that the regulations of the Society as to age and service in war shall be observed, and that in all other respects, if the Policy matures after the expiration of said two years, this Policy shall be indisputable.

And further, that if premiums upon this Policy, for not less than three complete years of assurance, shall have been duly received by said Society, and this Policy should thereafter become void in con-

sequence of default in payment of a subsequent premium, said Society will issue in lieu of such Policy, a new paid up Policy, without participation in profits in favor of said Jacob M. Mertens, his executors, administrators, or assigns, for the entire amount which the full reserve on this Policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single premium policies, now published by the Society; provided, however, that this Policy shall be surrendered duly receipted within six months of the date of such default of payment of premium as mentioned above.

This Policy is issued and accepted upon the condition that the provisions and requirements printed or written by the Society upon the back of this Policy are accepted by the assured as part of this
67 contract, as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof, The Equitable Life Assurance Society of the United States has caused this policy to be signed by two of its Executive Officers, at the office in the City of New York, the fifteenth day of February, A. D. one thousand eight hundred and eighty-nine.

Examined by

S.

H. 88.

Free Tontine.

No person except one of the Executive Officers designated on the back of this Policy, is authorized to make, alter or discharge contracts or waive Forfeitures.

(Endorsed upon the back of the policy are the following provisions and requirements, among others:)

1. That this Policy is issued under the Free Tontine Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this Policy shall be completed on the Fifteenth day of February, in the year Nineteen hundred and nine.

3. That no dividend shall be allowed or paid upon this Policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this Policy shall be then in force.

4. That all surplus or profits derived from such Policies on the Free Tontine Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned among such Policies as shall complete their Tontine Dividend Periods.

68 5. That upon the completion of the Tontine Dividend Period on February 15th, 1909, provided this Policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the privilege of the following options: Either, first to withdraw in cash this Policy's entire share of the assets, *i. e.*, the accumulated reserve, which shall be Eighteen Thousand eight hundred and twenty-three dollars and in addition thereto the sur-

plus apportioned by this Society to this Policy; second, to surrender the Policy for a life annuity; third, to withdraw in cash the share of the accumulated surplus apportioned by said Society to this Policy, and continue the Policy in force on the ordinary plan; fourth, to convert the accumulated profits into paid-up assurance to be added to the amount of the original Policy, and continue this Policy in force on the ordinary plan. To avail of this option, the person whose life is hereby assured must furnish a satisfactory certificate of good health from one of the medical examiners appointed by the Society; fifth, to continue the assurance for the original amount and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this Policy, provided that in any year in which the amount derived from such annuity together with the annual dividend, if any, on this Policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens or assigns; or sixth, to surrender the policy for its entire value in paid-up assurance on which no further payments of premium will be required. When, however, the amount of this paid-up assurance exceeds the amount of the original Policy, a satisfactory certificate of good health will be required from one of the medical examiners appointed by the Society. If either
69 the entire value or surplus be taken in cash, payment shall be made to the said Jacob M. Mertens and his receipt shall be a valid release to the Society.

EXHIBIT H.

The Equitable Life Assurance Society of the United States.

Premium.	Amount.
$272.50.	$10,000.
Age 36.	No. 252314.

(Copy.)

120 Broadway, New York.

Henry B. H*dye*, President.
James W. Alexander, Vice-President.
Samuel Borrowe, 2d Vice-President.
George W. Phillips, Actuary.
William Alexander, Secretary.

In Consideration of the Application for this Policy of Insurance, and of each of the statements made therein; And in further consideration of the payment of the sum of Two hundred and seventy-two dollars and fifty cents at the office of the Society in the City of New York, at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of two hundred and seventy-two dollars and fifty cents, to be made at the said Office, on or before the Twenty-first day of December, in every year, during the continuance of this contract; Does Promise to pay to Jennie Mertens, wife of

Jacob M. Mertens, for her sole use if living, in conformity with the Statute, and, if not living, to the surviving children of said Jacob M. Mertens or their guardian for their use, or if there be no such
70 children surviving, then to the executors, administrators or assigns of said Jacob M. Mertens the sum of Ten Thousand dollars (any indebtedness to the Society on account of this contract to be first deducted therefrom) at the Office of the Society in the City of New York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens of Syracuse, in the County of Onondaga, State of New York, shall have been furnished to the Society at its said office.

And the said Society does hereby further Promise and Agree that after three years from the date hereof, the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums, at the times and place, and in the manner herein stipulated, and that the regulations of the Society as to age, residence, travel, occupation and employments shall be observed, and that in all other respects, if the Policy matures after the expiration of said three years, this Policy shall be Indisputable.

This Policy is issued and accepted upon the condition that the provisions and requirements, printed or written by the Society, upon the back of this Policy, are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof, The Equitable Life Assurance Society of the United States has caused this Policy to be signed by its President and Secretary, at the Office in the City of New York, the Twenty-first day of December, A. D. one thousand eight hundred and eighty-two.

Examined by
S.

____ ____,
President.

____ ____,
Secretary.

For a Wife.
G. 82.
Tontine Savings Fund Policy.

71 Notice:—In Consideration of the Issuance of this Policy upon the Tontine Savings Fund Plan, all rights to a Paid-up Policy under the Provisions of Chapter 347, Laws of New York of 1879, have been Specifically Waived, Whether such Paid-up Policy be to Cover Temporary Insurance or Insurance to be Continued during the same term as the present Policy.

No person except the President, Vice-President, Actuary, Secretary or Assistant Secretary is authorized to make, alter or discharge contracts or waive Forfeitures.

(Endorsed on the back of the policy are the following provisions and requirements, among others:)

1. That this Policy is issued under the Tontine Savings Fund Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this Policy shall be completed on the Twenty-first day of December, in the year Nineteen hundred and two.

3. That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this Policy shall be then in force.

4. That all surplus or profits derived from such Policies on the Tontine Savings Fund Assurance Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned equitably among such Policies as shall complete their Tontine Dividend Periods.

72 5. That upon the completion of the Tontine Dividend Period on December 21, 1902, provided this policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the option either; First, to withdraw in cash this Policy's entire share of the assets; *i. e.*, the accumulated reserve, which shall be Twenty-nine hundred and eight 50/100 dollars, and in addition thereto, the surplus apportioned by this Society to this Policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up Policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the Society's medical examiners shall be required; thirdly, to continue the assurance for the original amount, and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this Policy, provided that in any year in which the amount derived from such annuity, together with the annual dividend on this Policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens, or assigns; or fourthly, to withdraw in cash the share of the accumulated surplus apportioned by said Society to this Policy, and continue the Policy in force on the ordinary plan.

Exhibit I.

This Indenture, made this sixteenth day of March, in the year Nineteen Hundred and One, between Jennie Mertens, Cornelia T. Mertens, Ernest T. Mertens, Charles R. Mertens, Francesca A.
73 Wallier, and Edmund A. Mertens of the first part, and the Varick Bank of New York, party of the second part, Witnesseth:

That whereas, the said Jennie Mertens is the wife of Jacob M. Mertens, of Syracuse, N. Y., and said Cornelia T. Mertens, Ernest T. Mertens, Charles R. Mertens, Francesca A. Wallier and Edmund A. Mertens are the only children of said Jacob M. Mertens, and the only beneficiaries in the policy of insurance hereinafter described:

Now, therefore, in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof

is hereby acknowledged, and for securing the payment of the loan and moneys hereinafter mentioned, the said parties of the first part do hereby sell, assign, transfer and set over unto the said party of the second part, its successors or assigns, policy No. 252314, issued by the Equitable Life Assurance Society of the United States on the Life of Jacob M. Mertens, bearing date the 21st day of December, in the year 1882, with all the right, title and interest therein, together with all the moneys which may be now due or hereafter payable thereunder and all dividends, benefits, options and advantages, to be derived therefrom, including the right to surrender said policy and to receive the surrender value thereof, accounting to the assignors for any surplus which may be realized over and above the amount due upon the loan or moneys advanced hereinafter mentioned.

This assignment of the said policy is made as collateral security for the re-payment to said party of the second part of all loans and moneys advanced and to be advanced and made by the said party of the second part to the co-partnership firm of J. M. Mertens & Co., located and doing business at the City of Syracuse, Onondaga
74 County N. Y., and this assignment shall be void and of no effect and the interest of the assignee in said policy released and discharged, upon the re-payment to said party of the second part of all such loans and moneys so advanced to said firm, together with interest thereon, to secure the payment of which this assignment is made and after notice of such repayment is given to said Society in writing.

It witness whereof, we have hereunto set our hands and seals this sixteenth day of March, 1901, each of us hereby certifying that all of the said parties of the first part are over twenty-one years of age.

JENNIE MERTENS. [L. S.]
CORNELIA MERTENS: [L. S.]
ERNEST T. MERTENS. [L. S.]
CHAS. R. MERTENS. [L. S.]
FRANCESCA M. WALLIER. [L. S.]
EDMUND A. MERTENS. [L. S.]

STATE OF NEW YORK, *County of Onondaga, ss:*

On this 16th day of March, 1901, before me personally came Jennie Martens, Cornelia T. Mertens, Ernest T. Mertens, Charles R. Mertens, Francesca A. Wallier and Edmund A. Mertens, to me known and known to me to be the same persons described in and who executed the foregoing assignment, and personally acknowledged that they executed the same.

PERRY A. WOOD, [SEAL.]
Notary Public, Onon. Co., N. Y.

75 EXHIBIT J.

(Copy.)

No. 121.

NEW YORK, *Sep.* 14, 1903.

The Western National Bank of the City of New York.

Pay to the order of Varick Bank of New York Ten Thousand, two hundred seventy-nine 00/100 dollars.

VARICK BANK OF NEW YORK,
A. H. DAY, *Cash'r.*

$10,279.00.

(Endorsed "Varick Bank of New York, A. H. Day, Cash'r.")

United States Circuit Court of Appeals, Second Circuit.

In the Matter of JACOB M. MERTENS and Others, Bankrupts; VARICK BANK OF NEW YORK, a Creditor, Appellant; ALBERT K. HISCOCK, Appellee.

The undersigned hereby stipulate and agree that the foregoing be and the same hereby is a true and correct transcript of the
76 record on appeal in the above-entitled proceeding, and that the excerpts of the papers and documents therein contained be printed in lieu of the several documents and papers filed in the office of the Clerk of the District Court of the United States for the Northern District of New York.

It is further stipulated that the time within which to certify said record be and the same hereby is extended to and including the 1st day of March, 1905, and that an order to that effect be entered without further notice.

Dated February 14th, 1905.

FRIED & CZAKI,
Attorneys for Appellant.
LEWIS & CROWLEY,
Attorneys for Appellee.

United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS and Others, Bankrupts.

I, William S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the Dis-
77 trict Court on appeal in the above-entitled matter, as the same has been stipulated by and between the attorneys for appellant and appellee.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Utica, Northern District of New York, this 17th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] W. S. DOOLITTLE, *Clerk.*

78 United States Circuit Court of Appeals for the Second Circuit.

No. 60. October Term, 1905.

Argued December 20, 1905; Decided February 23, 1906.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts, THE VARICK BANK OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Northern District of New York.

Before Judges Wallace, Lacombe, and Coxe.

Appeal by the Varick Bank of New York from an order of the District Court, made as a court of bankruptcy, disallowing two claims which the bank sought to prove, one against the partnership estate of the bankrupts and the other against the individual estate of Jacob M. Mertens, one of the partners.

WALLACE, *Circuit Judge:*

The decision of the court below proceeded upon the ground that the bank was a secured creditor for the value of two policies of insurance upon the life of Jacob M. Mertens, and had sold the securities after the filing of the petition in bankruptcy, although prior to the adjudication, in disregard of the provision of Section 57, Subdivision *h*, of the Bankrupt Act; and the order appealed from affirmed orders and rulings of the referee in bankruptcy refusing to allow the claims, and directing the value of the securities to be determined by the resale of them at public auction, upon notice to the trustee and the insurers, and the sum realized thereby to be applied in reduction of the claims.

79 We entertain no doubt that the order appealed from was in substance and effect a rejection of the claims such as to authorize an appeal pursuant to Section 25 of the Bankrupt Act, as well as a review pursuant to Section 24. The bank insisted that its claims were for a definite amount, the amount stated in its proofs of debt less the sum which it had already derived from the sale of the securities. The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction. It is true that upon a resale a larger sum might have been realized, and that the bank would have been a gainer by the event. But if the balance which it asserted to be due was correct, it was en-

titled then and there to have its claims allowed for the amount specified, and to insist that it should not be exposed to the chances of a larger reduction.

The propriety of the disallowance of the claim against the partnership estate depends upon considerations which are peculiar to that claim and have no bearing upon the claim against the individual estate of Jacob M. Mertens. If the securities were not the property of the partnership when they were pledged to the bank as collateral for the payment of the indebtedness, the bank was entitled to have its claim against the partnership allowed, and allowed at its face without any deduction. If they were not part of the partnership assets, they were not part of the joint estate in bankruptcy, and as to that estate the bank was under no obligation to apply or realize their value in reduction of its claim. If they were the property of Jacob M. Mertens individually, and were pledged by him, the bank would have been at liberty upon selling them to apply the proceeds to the payment of his individual debt; and no application having been made at the time, the settled rule of equity and of the courts of bankruptcy required the application of the proceeds in exoneration of the individual estate.

In the case of Plummer (1 Phillips, 56) the Lord Chancellor in his opinion said: "In administration under bankruptcy, the joint estate and separate estate are considered as distinct estates; and accordingly it has been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, upon the ground that it is a different estate."

In Wilder *v.* Keeler (3 Paige, 167) Chancellor Walworth said: "A creditor of a joint estate is always entitled to whatever he may obtain out of the fund in the hands of the surviving partner, without relinquishing his security against the separate estate of the deceased partner."

In *Ex Parte* Whiting (14 Nat. Bank Register, 307) Judge Lowell said: "When one partner has pledged his shares for the debts of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished security, that a sale and application of the security is required by the bankrupt law." Many other authorities might be cited to the same effect, but the doctrine is so well established that it would be superfluous to refer to them. The provisions of the present Bankrupt Act requiring secured creditors to surrender preferences, and when the security is not preferential to have its value determined as a condition precedent to the allowance of their claims, have no application to cases in which the security was not the property of the bankrupt.

There was no evidence tending to show that the policies belonged to the partnership, except the circumstance that on one occasion the partnership made an agreement pledging them to the bank for the payment of a partnership note and all other liabilities to the bank which might thereafter arise. As the policies insured the life of Jacob M. Mertens, and were payable, one to him or his legal representatives, and the other to his wife or surviving children and to him

in the event of their death before his, the legitimate presumption is that the title to one of them was his absolutely, and the title to the other was in his wife, his children and himself. The circumstance that the partnership pledged them does not afford a scintilla of legal evidence that the title was in the partnership. There are in-
81 struments to which the title passes by delivery, such as notes and ordinary bonds for the payment of money. Possession of an instrument of this class is presumptive evidence of title, and the holder can recover in an action upon it by producing it upon the trial, without further evidence of title. But a policy of insurance does not belong to this class of instruments, and because possession is not *prima facie* evidence of title, no recovery can be had by the holder upon it, when not payable to him, without proof of an assignment. The agreement pledging the policies was not even moral evidence that they were owned by the partnership, because it appears that Jacob M. Mertens joined in it individually by a separate agreement executed contemporaneously and endorsed upon its back.

We conclude that the claim against the partnership estate should have been allowed in full.

The bank's claim against the individual estate was for an indebtedness of $9,118, the balance alleged to be due from Jacob M. Mertens, after crediting his account with the proceeds of the sale of the two policies which had been pledged to the bank as collateral for the payment of the indebtedness. The pledge was made long prior to the filing of the petition in bankruptcy, and it is not asserted that it was preferential. By its terms the bank was authorized, upon default in the payment of any part of the indebtedness, to "sell, assign, or otherwise dispose of the said collateral security at public or private sale, with or without notice to the pledgor," and to "purchase the whole or any part of the property sold free from any right of redemption" on the part of the pledgor. After the petition in involuntary bankruptcy, and on September 14, 1903, the bank caused the two policies to be sold by an auctioneer at a public salesroom, without any notice having been given to any person except its own agents. There was no competition at the sale, and upon the bid of its own agent the bank became the purchaser for the sum of $10,250. No testimony was offered by the trustee to show that the value of the policies was greater than the amount of the bid, and there
82 is no evidence in the record of the value independently of the bid.

If this was such a sale as was authorized by the terms of the pledge, we do not doubt that the bank in making it was within its rights, and that no rule of the common law or doctrine of equitable jurisprudence, and none of the provisions of the Bankrupt Act, can be invoked to defeat or invalidate it.

Except for the terms of the pledge, the sale would have been voidable; if for no other reason, because the bank purchased the policies. (Story on Bailments, § 319.) But in this respect, as also with respect to a private sale without notice, the pledgor had by his contract consented in advance to that which was done by the bank. Indeed, by the stipulation of such a pledge as this was the pledgor in effect

commits the disposition of his property, in case of his failure to pay his obligation, practically to the honor of the pledgee, and releases the pledgee from all the legal obligations which would ordinarily rest upon him in disposing of the property to satisfy his demand. The authorities sanction such contracts. In Baker *v.* Drake (66 N. Y., 518) it was decided that the parties to a transaction which creates the relation of pledgee and pledgor between them, may provide by contract for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute, against public policy, or fraudulent. In Toplitz *v.* Bauer (161 N. Y., 332) the court said: "In recent times the rights of the parties to enter into a contract providing for a sale or disposition without notice have been recognized, and the disability of the pledgee to become a purchaser, it is said, may be removed by express stipulation of the parties." In Williamson *v.* United States Trust Co. (133 N. Y., 660), where the terms of the pledge authorized the pledgees to sell the securities "in such manner as they in their discretion may deem proper, without notice," the sale without notice was upheld. In Fidelity Insurance Co. *v.* Roanoke Iron Co. (81 F. R., 440) it was decided that the holder of collateral security for a debt, who had been given by the terms of the pledge full power and authority, on failure of the debtor to pay, to sell the collateral at public or private sale, and without advertising or giving the pledgor any notice or making any demand for payment, may buy such collateral, at a sale conducted in good faith, and thereby acquire a good title. The court said: "It is undoubtedly true that where a pledgee without authority sells negotiable collateral, he cannot become the purchaser; but this doctrine does not apply in a case like this, where the pledgee is given full power and authority, on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor any notice or making any demand for payment. * * * It would be imposing great hardship and injustice upon the pledgee, under the circumstances of this case, to say that while acting under the authority given him by the pledgor, and in good faith, he shall be required to stand by and see the only security he has for the payment of his debt perhaps sacrificed, and he not permitted to protect his interests in the only way he can, by becoming the purchaser himself." It will be noticed that in the case there was no stipulation authorizing the pledgee to become the purchaser. See also Manning *v.* Shriver (79 Md., 41); Appleton *v.* Turnbull (84 Me., 72); Chouteau *v.* Allen (70 Mo., 290). It may happen that a pledgee will be unable to obtain from others the sum which he believes he may be able to realize from the property by purchasing it himself, and disposing of it when a favorable opportunity offers. If a pledgor sees fit to consent to a stipulation like those in this case, there would seem to be no reason why he should not be held to the contract.

83

The court below regarded the sale made by the bank as a fraudulent sale. There was no evidence of fraud, unless the facts which have been referred to justify the inference of fraud. We are at a

loss to understand how fraudulent conduct can justly be imputed to a pledgee when it appears that whatever was done in executing the power of sale was done in full compliance with the terms
84 of the pledge, and when there is no evidence than any unconscionable advantage was taken of the pledgor or his creditors. Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase it himself at a valuation so inadequate as to suggest a fraudulent purpose. If the valuation in this case was unfair, the burden was on the trustee to prove the fact.

The decision of the court below proceeded not only upon the ground that the sale was unwarranted by the terms of the pledge, but also upon the ground that having been after the filing of the petition in bankruptcy it was inoperative and subject to the supervision and control of the court, because the Act suspends the exercise of the pledgee's remedy pending the adjudication of bankruptcy.

By the present Act the title of the trustees is vested in the estate of the bankrupt "as of the date he was adjudged a bankrupt." We are of opinion that until the date of the adjudication a lienor or pledgee is at liberty to perfect any title which the nature of the lien permits. Under the Act of 1867 no lien could be acquired after the filing of the petition in bankruptcy because the title of the assignee vested as of the commencement of the proceeding in bankruptcy. Now the trustee takes the property of the bankrupt in the condition in which he finds it at the date of the adjudication, unless it has been encumbered fraudulently or in contravention of some of the provisions of the Act. Under the former Act there were many decisions that a lien previously acquired could not be enforced subsequent to the commencement of the proceeding except with the permission of the bankruptcy court. The Supreme Court however refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. Eyster *v.* Gaff (91 U. S., 521); Jerome *v.* McCarter (94 U. S., 734). The change in the present Act, by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the Act of 1867. It was intended, we think, to permit all legitimate business transactions between
85 a debtor and those dealing with him to be carried out and consummated as freely until he has been adjudicated a bankrupt as though no proceeding were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding. That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy is indicated by the change made

in the present Act with respect to the proof of claims by secured creditors. By the former Act it was provided that a secured creditor should be admitted as a creditor only for the balance of his debt after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the court. Under that provision, if a pledgee sold the pledged property prior to the appointment of the assignee, or without the permission of the court, he was precluded from proving his claim or obtaining any share of the bankrupt's estate to which he would otherwise have been entitled. The present Act provides that the value of his security may be determined, among other methods, by converting it into money pursuant to his contract rights, and thus if he has enforced it as the contract with the debtor allowed he is permitted to prove the unsatisfied balance of his claim. Section 57, Subdivision *h*, prescribes several modes of valuation, and the one referred to is exclusive of the others and is superfluous and useless unless it is intended to authorize the creditor without interference by the trustee or the court to value his own security, provided
86 he turns it into money "according to the terms of the agreement pursuant to which" it was delivered to him.

We conclude that the claim against the individual estate should have been allowed for the balance claimed.

The order of the court below is reversed with costs and with instructions to proceed conformably with this opinion.

F. M. Czaki, for the Appellant.
W. B. Crowley, for the Appellees.

87 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 5th day of March one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts; THE VARICK BANK OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs, and with instructions to the court below to proceed in accordance with the opinion of this Court.

W. J. W.
E. H. L.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

88 Endorsed: United States Circuit Court of Appeals, Second Circuit. Matter of Mertens. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 5, 1906. William Parkin, Clerk.

89 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; THE VARICK BANK OF NEW YORK, Appellant.

The Varick Bank of New York having appealed to this Court from an order and decree of the District Court of the United States for the Northern District of New York, and said appeal having come on to be heard, this Court having made and filed its decision, does make the following findings to be filed with its decree herein.

This Court finds as matters of fact:

1. On August 18, 1903, an involuntary petition in bankruptcy was filed against said bankrupts individually and as such co-partners, and Albert K. Hiscock was on that day duly appointed receiver of their estates in bankruptcy and qualified as such. On September 15, 1903, they were duly adjudicated bankrupts. Thereafter said Hiscock was duly elected and qualified as trustee of said estates.

2. At the time of the filing of the petition, the Varick Bank of New York held notes made or endorsed or guaranteed by Jacob M. Mertens & Co., said co-partnership, of various dates aggregating in amount $27,893.85. Of said notes five, aggregating in amount $22,500 were collateral notes. The following is a complete copy of one of them and each was executed upon a printed form like that in this copy:

$5,000.00. NEW YORK, N. Y., *April 20th*, 1903.

Four months after date, for value received, the undersigned, jointly and severally promise to pay to the Varick Bank of New York,
90 N. Y., or order, at its Banking Office, 260 West Broadway, N. Y., in funds current through the New York Clearing House, Five Thousand Dollars thereof, as well as for the payment of any other liability or liabilities of the undersigned to the holder of this note, due or to become due, whether now existing or hereafter arising, the following property, viz:

Insurance policy No. 417,171 for $50,000.00 in the Equitable Life Assurance Society of New York of a market value estimated by the undersigned at $— and the undersigned agree to deliver to the said holder additional securities to its satisfaction, should the market value of the said securities as a whole, suffer any decline or the Bank at any time deem the securities insufficient, and also hereby give to the said Bank (but no other holder) a lien for the amount of all the liabilities of the undersigned to it upon all the property or securities given unto or left in the possession of the said Bank by the undersigned and also upon any balance of the deposit account of the undersigned with the said bank.

On the non-performance of this promise or upon the non-payment of any of the liabilities above mentioned, or upon the failure of the undersigned forthwith, with or without notice, to furnish satisfactory additional securities in case of decline as aforesaid,—then, and in either such case, this note shall forthwith become due and payable, without demand or notice and full power and authority are hereby given to said holder to sell, assign and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the undersigned, for safe keeping or otherwise, at any Broker's Board or at public or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived
91 and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said holder may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to it or him as to it or him shall seem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said holder for any deficiency arising upon such sale or sales. The undersigned do hereby authorize and empower the said Bank (but no other holder) at its option, at any time, to appropriate and apply to the payment and extinguishment of any obligations or liabilities of the undersigned to it, whether now existing or hereafter contracted any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

J. M. MERTENS & CO.

(Endorsed on the back is the following:)

In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y. its successors, endorsers or assigns, the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender or extension.

J. M. MERTENS & CO.
J. M. MERTENS.

Protested for non-payment Aug. 20th, 1903.

7—244

92 The other four collateral notes are described as follows:

Note dated May 4, 1903, due September 4, 1903, for $5,000 made by J. M. Mertens & Co., and endorsed by J. M. Mertens & Co., and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note dated July 17, 1903, due November 17, 1903, for $5000 made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note July 20, 1903, due November 20, 1903, made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York. Note in the amount of $5,000.

Note dated August 6, 1903, due December 7, 1903, made by J. M. Mertens & Co. and Jacob M. Mertens and endorsed by J. M. Mertens & Company, Jacob M. Mertens and Jennie Mertens, depositing as collateral security insurance policies No. 417,171 for $50,000, and No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York. Note in the amount of $2500.

3. At the time of the filing of the petition in bankruptcy, said Varick Bank held notes guaranteed or endorsed by Jacob M. Mertens individually of various dates, aggregating in amount $25,489.62. Of said notes, five aggregating in amount $22,500 were collateral notes, being the same collateral notes mentioned above. One of these notes, amounting to $2500 was made by Jacob M. Mertens and by Jacob M. Mertens & Co., that being the only note on which Jacob M. Mertens was liable as maker.

4. At the time of the filing of the petition in bankruptcy, said Varick Bank held as collateral to said indebtedness the policies mentioned in said notes, the same being held under the terms of said notes and under two assignments, one of which was a collateral assignment of policy No. 252314, as security
93 for the sum of $5,000 executed by Jennie Mertens and Jacob M. Mertens, which assignment contained no provision for or power of sale whatever. The other was a collateral form of assignment of policy No. 417171 as security for the sum of $15,000, executed by Jennie Mertens and Jacob M. Mertens, which assignment contained no provision for or power of sale whatever. Said policy No. 417171 was issued by the Equitable Life Assurance Society and provides as follows:

EXHIBIT G.

The Equitable Life Assurance Society of the United States.

Premium, $1735.00
Age 42.

Amount, $50,000.
No. 417171.

(Copy.)

120 Broadway, New York.

President:
Henry B. Hyde.
George W. Phillips, Actuary.
J. G. Van Cise, Assistant Actuary.
S. D. Ripley, Cashier.
William Alexander, Secretary.
Thomas D. Jordan, Assistant Secretary.
Edward A. Pearson, 2d. Assistant Sec'y.
James B. Loring, Registrar.
James W. Alexander, Vice President.
Samuel Borrowe, Second Vice President.
Edward W. Scott, Third Vice President.

In consideration of the application for this policy of insurance, and of each of the statements made therein; And in further consideration of the payment of the sum of Seventeen Hundred and Thirty-Five Dollars and — cents, at the office of the Society in the City of New York, at the date hereof and of the annual payment of seventeen hundred and thirty-five dollars and — cents, to be made at the said office, on or before the Fifteenth day of February, in every year, during the continuance of this contract;

94 Does promise to pay to Jacob M. Mertens, his executors, administrators or assigns, the sum of Fifty Thousand Dollars, (any indebtedness to the Society on account of this contract to be first deducted therefrom), at the Office of the Society, in the City of New York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens, of Syracuse, in the County of Onondaga, State of New York, shall have been furnished to the Society at its said office.

And the said Society does hereby further promise and agree that after two years from the date hereof, the only conditions which shall be binding upon the holder of this Policy are that he shall pay the premiums, at the times and place, and in the manner herein stipulated, and that the regulations of the Society as to age and service in war shall be observed, and that in all other respects, if the policy matures after the expiration of said two years, this policy shall be indisputable.

And further, that if premiums upon this policy, for not less than three complete years of assurance, shall have been duly received by said Society, and this policy should thereafter become void, in con-

sequence of default in payment of a subsequent premium, said Society will issue in lieu of such policy, a new paid-up policy, without participation in profits in favor of said Jacob M. Mertens, his executors, administrators or assigns, for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single premium policies, now published by the Society; provided, however, that this policy shall be surrendered duly receipted within six months of the date of such default of payment of premium as mentioned above.

This policy is issued and accepted upon the condition that the provisions and requirements printed or written by the Society
95 upon the back of this policy are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the Equitable Life Assurance Society of the United States, has caused this policy to be signed by two of its Executive Officers, at the office in the City of New York the Fifteenth day of February, A. D., One Thousand Eight Hundred and Eighty-Nine.

Examined by S.
H 88 Free Tontine.

No person except one of the Executive Officers designated on the back of this policy is authorized to make, alter or discharge contracts or waive Forfeitures.

(Endorsed upon the back of the policy are the following provisions and requirements among others.)

1. That this policy is issued under the Free Tontine Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this policy shall be completed on the Fifteenth day of February, in the year Nineteen Hundred and Nine.

3. That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this policy shall be then in force.

4. That all surplus or profits derived from such policies on the Free Tontine Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned among such policies as shall complete their Tontine Dividend Periods.

5. That upon the completion of the Tontine Dividend Period on February 15th, 1909, provided this policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the privilege of the following options: Either, first to withdraw in cash this policy's entire share of the assets, *i. e.*, the accu-
96 mulated reserve, which shall be eighteen thousand eight hundred and twenty-three dollars, and in addition thereto the surplus apportioned by this Society to this policy; second, to surrender the policy for a life annuity; third, to withdraw in cash the

share of the accumulated surplus apportioned by said Society to this policy, and continue the policy in force on the ordinary plan; fourth, to convert the accumulated profits into paid up assurance to be added to the amount of the original policy, and continue this policy in force on the ordinary plan. To avail of this option, the person whose life is hereby assured must furnish a satisfactory certificate of good health from one of the medical examiners appointed by the Society; fifth, to continue the assurance for the original amount and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this policy, provided that in any year in which the amount derived from such annuity, together with the annual dividend, if any, on this policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens or assigns; or sixth, to surrender the policy for its entire value in paid-up assurance on which no further payments of premium will be required. When, however, the amount of this paid-up assurance exceeds the amount of the original policy, a satisfactory certificate of good health will be required from one of the medical examiners appointed by the Society. If either the entire value or surplus be taken in cash, payment shall be made to the said Jacob M. Mertens and his receipt shall be a valid release to the Society.

Said policy No. 252314 was issued by the Equitable Life Assurance Society and provides as follows:

EXHIBIT H.

The Equitable Life Assurance Society of the United States.

Premium $272.50 Age 36

Amount $10,000. No. 252314

(Copy.

97 120 Broadway, New York.

Henry B. Hyde, President.
James W. Alexander, Vice President.
Samuel Borrowe, 2d, Vice President.
George W. Phillips, Actuary.
William Alexander, Secretary.

In consideration of the application for this policy of insurance, and of each of the statements made therein; and in further consideration of the payment of the sum of two hundred and seventy-two dollars and fifty cents at the office of the Society in the City of New York, at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of two hundred and seventy-two dollars and fifty cents, to be made at the said office, on or before the twenty-first day of December in every year, during the continuance of this contract; does promise to pay to Jennie Mertens, wife of Jacob M.

Mertens, for her sole use if living, in conformity with the statute and, if not living, to the surviving children of said Jacob M. Mertens, or their guardian for their use, or if there be no such children surviving, then to the executors, administrators or assigns of said Jacob M. Mertens, the sum of ten thousand dollars (any indebtedness to the society on account of this contract to be first deducted therefrom) at the office of the Society in the City of New York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens of Syracuse, in the County of Onondaga, State of New York, shall have been furnished to the Society at its said office.

And the said Society does hereby further promise and agree that after three years from the date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums, at the times and place and in the manner herein stipulated, and that the regulations of the Society as to age, residence, travel, occupation and employment shall be observed, and that in all other respects, if the policy matures after the expiration
98 of said three years, this policy shall be indisputable.

This policy is issued and accepted upon the conditions that the provisions and requirements, printed or written by the Society, upon the back of this Policy, are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the Equitable Life Assurance Society of the United States has caused this policy to be signed by its President and Secretary at the office in the City of New York, the twenty-first day of December, A. D., One Thousand Eight Hundred and Eighty-Two.

Examined by S.

——— ———, ——— ———,
Secretary. *President.*

For a wife G 82 Tontine Savings Fund Policy.

Notice.—In consideration of the issuance of this policy upon the Tontine savings fund plan, all rights to a paid-up policy under the provisions of chapter 347, Laws of New York of 1879, have been specifically waived, whether such paid up policy be to cover temporary insurance or insurance to be continued during the same term as the present policy.

No person except the President, Vice-President, Actuary, Secretary or Assistant Secretary, is authorized to make, alter or discharge contracts or waive forfeitures.

(Endorsed on the back of the Policy are the following provisions and requirements among others).

1. That this policy is issued under the Tontine Savings Fund Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this policy shall be completed on the twenty-first day of December, in the year Nineteen Hundred and Two.

3. That no dividend shall be allowed or paid upon this Policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period, as aforesaid, and unless this Policy shall be then in force.

4. That all surplus or profits derived from such policies
99 on the Tontine Savings Fund assurance plan, as shall not be in force at the date of the completion of their respective Tontine Dividend periods, shall be apportioned equitably among such policies as shall complete their Tontine Dividend Periods.

5. That upon the completion of the Tontine Dividend Period on December 21, 1902, provided this policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the option either: First, to withdraw in cash this policy's entire share of the assets, *i. e.*, the accumulated reserve, which shall be twenty-nine hundred and eight 50/100 dollars, and in addition thereto, the surplus apportioned by this Society to this policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the Society's medical examiners shall be required; thirdly, to continue the assurance for the original amount, and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this policy, provided that in any year in which the amount derived from such annuity, together with the annual dividend on this policy shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens, or assigns; or fourthly, to withdraw in cash the share of the accumulated surplus apportioned by said Society to this policy, and continue the policy in force on the ordinary plan.

5. On or about September 9, 1904, said Varick Bank filed two proofs of claim upon the foregoing notes, one against the co-partnership, and the other against Jacob M. Mertens individually for $9,-118.37, and on November 30, 1904, filed amended proofs as follows:

100 In the District Court of the United States for the Northern District of New York.

In Bankruptcy. 1527.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTENS, and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and for this an amendment of a proof of debt heretofore filed herein by the Varick Bank of New York, makes oath and says:

That he is the Cashier of the Varick Bank of New York, a cor-

poration incorporated by and under the Laws of the State of New York and authorized to do business in the City of New York, County and State of New York. That this proof is not made by the Treasurer of such corporation for the reason that said corporation has no Treasurer, and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof; and that the said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, as composing the firm of J. M. Mertens & Co., against whom a petition for adjudication of bankruptcy has been filed, were at and before the filing if said petition, and still are, justly and truly indebted to the said corporation in the sum of twenty-seven thousand eight hundred and ninety-three and 85/100 ($27,893.85) dollars. That the consideration of said debt is as follows:

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York, duly discounted for the account of said bankrupts, a certain promissory note in writing made by
101 Cole & Spellman, dated May 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of two hundred and eighty and 61/100 ($280.61) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of said bankrupt, a certain promissory note in writing, made by Cole & Spellman, dated April 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of four hundred and twenty and 29/100 ($420.29) dollars. That the said Varick Bank of New York fully discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing, made by G. W. Hydron, dated April 18, 1903, due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and ninety-four and 72/100 ($494.72) dollars. That the said Varick Bank of New York City duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing, made by G. W. Hydron, dated April 18, 1903, and due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four
102 hundred and ninety-six and 31/100 ($496.31) dollars. That the said Varick Bank of New York duly discounted the said

promissory note as aforesaid, before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof and are still the owners thereof.

That heretofore and prior to the filing of the petition herein the said Varick Bank of New York duly discounted for the account of the said Bankrupts, a certain promissory note in writing made by Clarence H. Spraker, dated April 1, 1903, due August 31, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of one hundred ($100) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by John S. Hough, dated July 10, 1903, due November 10, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of six hundred and twelve and 30/100 ($612.30) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid, before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof and are still the owners thereof.

That heretofore and on or about the 20th day of April, 1903, the said Varick Bank of New York, for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date, and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co., and Jacob M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York for a valuable consideration,
103 duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 4th day of September, 1903, and endorsed by the said J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration, duly discounted for the account of said J. M. Mertens & Co., their promissory note in writing, dated on said date, and due the 17th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 20th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of November, 1903, and endorsed by J. M. Mertens & Co., and J. M. Mertens, indi-

vidually, for the sum of five thousand ($5,000) dollars and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York, for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, and endorsed by Jennie Mertens for the sum of two thousand five hundred ($2500), and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 21st day of April, 1903, and due the 21st day of August, 1903, made by the Rochester Cloth-
104 ing Company, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G. Fox & Son, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one thousand dollars ($1,000) *dollars.* That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition hereof, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of October, 1903, made by John S.
105 Hough, and endorsed by J. M. Mertens & Company and J. M. Mertens, individually, for the sum of six hundred and thirty-nine and 5/100 ($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the

lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 2nd day of June, 1903, and due the 2nd day of October, 1903 made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That no part of said debt has been paid by the said J. M. Mertens & Co. That there are no offsets or counterclaims to the same, except the sum of one hundred and seventy-three and 21/100 ($173.21) dollars, held by the Varick Bank of New York as a general deposit to the credit of J. M. Mertens & Co., bankrupts above named, at the time of the filing of the petition in bankruptcy herein, and the said J. M. Mertens & Co., bankrupts above named, are entitled to a rebate for unearned interest at the time of the filing of the petition in bankruptcy herein in the sum of one hundred and fifty-six and 17/100 ($156.17) dollars, leaving due and owing to the said Varick Bank of New York the sum of twenty-seven thousand five hundred and sixty-four and 47/100 ($27,564.47) dollars, and upon which indebtedness no judgment has been rendered; and that said corporation has not, nor has any person for its order, or to the knowledge or belief of deponent, for its use, had or received any manner of
106 security for said debt from the said J. M. Mertens & Co.

That at the time of the filing of said petition, the said Varick Bank of New York held as collateral security for the payment of the said debt, which said collateral was deposited by J. M. Mertens, individually, the following described property, to wit:

The sum of six thousand ($6,000) dollars cash, held on deposit with the Varick Bank of New York, for the individual account of J. M. Mertens, a certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, Numbered 417171 for the sum of fifty thousand ($50,000) dollars, and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, Numbered 252314, for the sum of ten thousand ($10,000) dollars.

ADDISON H. DAY, [SEAL.]
Cashier of Varick Bank of New York.

Subscribed and sworn to before me this 30th day of November, 1904.

HENRY J. DORGELOH,
[SEAL.] *Notary Public, Kings Co.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, Individually, Bankrupt.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and for this an amendment of a proof of debt heretofore filed herein
107 by the Varick Bank of New York, makes oath and say-

That he is the Cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to — business in the City of New York, County and State of New York. That this proof is not made by the treasurer of such corporation for the reason that said corporation has no treasurer and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof; and that the said Jacob M. Mertens against whom a petition for adjudication in bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of twenty-five thousand four hundred and eighty-nine and 62/100 ($25,489.62) dollars. That the consideration for said debt is as follows:

That heretofore and on or before the 20th day of April, 1903, the said Varick Bank of New York, for a valuable consideration, duly discounted to the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co., and Jacob M. Mertens, individually, for the sum of five thousand ($5,000) dollars and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York, for a valuable consideration, duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date, and due the 4th day of September 1903, and endorsed by the said J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration, duly discounted for the account of J. M. Mertens & Co., their
108 promissory note in writing dated on said date and due the 17th day of November, 1903, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 20th day of July, 1903, the said Varick Bank of New York, for a valuable consideration, duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 20th day of

November, 1903, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, and endorsed by Jennie Mertens, for the sum of two thousand five hundred ($2,500) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 21st day of April, 1903, and due the 21st day of August, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration and before maturity, thereby becoming the lawful owner and holder thereof and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition
109 herein, the Varick Bank of New York duly discounted for said J. M. Mertens & Co., a certain promissory note, dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G. Fox & Son, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one thousand ($1,000) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 1st day of July, 1903, and due the 1st day of October, 1903, made by John S. Hough and endorsed by J. M. Mertens & Company, and J. M. Mertens, individually, for the sum of six hundred and thirty-nine and 5/100

($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

110 That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 2nd day of June, 1903, and due the 2nd day of October, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner and holder thereof.

That no part of said debt has been paid; that there are no offsets or counterclaims to the same, except the sum of six thousand ($6,000) dollars, held by the said Varick Bank of New York, on deposit and as collateral security at the time of the filing of the petition herein. That at the time of the filing of the petition in bankruptcy herein, the Varick Bank of New York also held as collateral security, to wit: A certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, Numbered 417171 for the sum of fifty thousand ($50,000) dollars, and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, Numbered 252314, for the sum of ten thousand ($10,000) dollars.

That under and by virtue of the terms of the agreement under which the said policies were deposited as collateral with the said Bank, the said Bank was authorized and empowered by the said bankrupt, upon default in the payment of the said debt or any part thereof, to sell, assign or otherwise dispose of the said collateral security at public or private sale, with or without notice to the said bankrupt as is more particularly specified in the said agreement.

That in accordance with the said agreement as aforesaid,

111 the said Varick Bank of New York did, prior to the date of the adjudication herein and subsequent to the date of the filing of the petition, convert the said policies into money in accordance with the terms of the agreement under which the same were deposited, realizing therefore the sum of ten thousand two hundred and twenty-one ($10,221.) dollars, leaving due and owing to the said Varick Bank of New York the sum of nine thousand one hundred and eighteen and 37/100 ($9,118.37) dollars from the said Jacob M. Mertens and upon which said indebtedness no judgment has been rendered.

ADDISON H. DAY, [SEAL.]
Cashier of Varick Bank of New York.

Subscribed and sworn to before me this 30th day of November, 1904.

[SEAL.] HENRY J. DORGELOH,
Notary Public, Kings Co.

6. Thereafter the trustee filed objections to said proofs of claim, alleging in effect that the sale of said policies was illegal; that the value of the securities held by the claimant had not been ascertained, as required by the Bankruptcy Act; and that the policies were still held by the Varick Bank as collateral to said indebtedness, the trustee still owing the equity.

7. The hearing on the said claims and objections thereupon came on before the referee in bankruptcy, and the following facts were conceded:

First. It is mutually conceded by the respective parties that prior to or on the 14th day of September, 1903, the Varick Bank gave to its attorneys, Messrs. Fried & Czaki, policies Nos. 417171 and 252314, issued by the Equitable Life Assurance Society upon the life of Jacob M. Mertens.

Second. Likewise conceded, that prior to or on the 14th day of September, 1903, and prior to or on the 14th day of September, 1903, and prior to the sale thereof, Frederick M. Czaki handed said policies to one Samuel Goldsticker, duly licensed auctioneer, with instructions to sell the same at public auction at the New York Real Estate Sales Rooms, in the City of New York, Borough of Manhattan, and that on the said 14th day of September, 1903, at 2 P. M. thereof, the said policies were offered for sale at said New York State Real Estate Sales Rooms to the highest bidder
112 by said Samuel Goldsticker, auctioneer.

Third. That no notice of said sale was given to anyone, except said Varick Bank.

Fourth. That on said 14th day of September, 1903, at 2 P. M., the said policies were offered for sale by said Samuel Goldsticker, auctioneer. That there was only one bid made which was for the sum of $10,250, made by said Czaki, and which bid was made in the name of Herbert M. Delanoie, who was not present at said sale; said policies were sold separately, policy No. 417171 was sold for the sum of $7,000 and policy No. 252314 was sold for the sum of $3250.

Fifth. That said Varick Bank of New York had instructed said Czaki that should he purchase said policies to do so in the name of said Delanoie.

Sixth. That said Varick Bank of New York prior to said sale made its check on the Western National Bank to its own order for the amount as therein stated, which said check said Varick Bank's cashier cashed in bills, which bills were thereupon handed to said Czaki. (Said check was dated September 14, 1903, and was for the amount of $10,279.)

Seventh. That said Czaki gave said money to said auctioneer after the sale of the said policies and that the auctioneer's fees were $29.

Eighth. That after said sale the said auctioneer gave said Czaki his certified check for $10250 to the order of the Varick Bank, which check was delivered to the said Bank by said Czaki.

Ninth. That the papers marked, Exhibits A, B, C and D, are copies of the originals and are received in evidence with the same force and effect as though originals, said Exhibits being the bills of sale executed, respectively, by the Varick Bank of New York and Samuel Goldsticker, auctioneer, upon the sale of the said policies.

Tenth. That on September 17th or thereabouts, said Herbert M. Delanoie received said assignments and policies and obtained a loan thereon from the Knickerbocker Trust Company of $10250
113 which amount on that day said Delanoie delivered to the Varick Bank.

Eleventh. That said policies were bid in for said Varick Bank at said sale and that whatever title was acquired at said sale by said Delanoie was taken for it and that said Delanoie ever since has and still holds said policies for said Varick Bank subject to the rights of the Knickerbocker Trust Company therein to the extent of said loan for $10250 and the further sum of $2622.75 since loaned thereon with interest.

Twelfth. Likewise conceded that Exhibits E and F are copies of assignments relating to said policies which were delivered to said Bank at or about the times of their respective dates which copies may be received in evidence with the same force and effect as the originals thereof, being assignments on the blank forms furnished by the Equitable Life Assurance Society. (Exhibit E is an assignment as collateral security of Policy No. 417171 made to the Varick Bank by Jacob M. Mertens, dated March 21, 1901, and a receipt for said policies signed by said Varick Bank. Exhibit F is an assignment of policy No. 252314, as collateral security made to the Varick Bank of New York by Jennie Mertens and Jacob M. Mertens and dated March 25, 1901. Said policies are the same policies hereinbefore referred to).

Thirteenth. That during the years 1901 and a portion of 1902 J. Maus Schemerhorn was the President of the Varick Bank of New York and he was immediately succeeded by John T. Sproull, as President of said Bank. There has since been no other president.

Fourteenth. That on August 19, 1903, said Varick Bank had actual notice that a receiver in bankruptcy of J. M. Mertens & Company and of its individual members had been appointed.

Fifteenth. That Exhibits G and H, offered in evidence and received, are correct copies of the originals and are received with the same force and effect as though originals, being policies No. 417171, Exhibit G, and policy No. 252314, Exhibit H.

Sixteenth. That Exhibit I is a correct copy of an assign-
114 ment of policy No. 252314, to said Varick Bank executed by Jennie Mertens and others, being all the beneficiaries in said policies which was delivered to said bank at or about the time of its date and is received in evidence. (Said assignment is made as collateral security for all loans and monies advanced and to be advanced by the bank for the firm of Jacob M. Mertens & Co. and is executed by the wife and all of the children of said Jacob M. Mertens, and is dated March 16, 1901.)

8. Thereupon the following took place:

Mr. CZAKI: I ask the Court to allow the claims of the Varick Bank of New York as filed upon the records and documents in evidence.

Mr. CROWLEY: I move for the disallowance of both of the claims on the ground that the claims have not been properly proved; that the value of the securities set forth in the claims has not been proved and no evidence from which that value can be ascertained and found by the Court has been given so as to establish the balance.

Mr. CZAKI: The attorney for the creditors requests to know of the attorney for the trustee whether he rests his case under the objections as filed.

Mr. CZAKI: I move that the referee decide that the burden of proof in the proceedings is upon the trustee, not having received any response to my question as to whether he had rested.

The REFEREE: I think that the transaction of September 14th, through the auctioneer, consummated in the bills of sale referred to in the ninth concession, under all the concessions made, was not such a sale of the insurance policies of either of them, as would have barred the right of the bankrupt under the assignments of the policies, Exhibits E & F, read in connection with the agreements made upon the notes, the contents of which are shown in the proofs of claim, to redeem the same upon payment of his indebtedness secured thereby. I do not think the sale was a public sale in any fair interpretation — that phase. It appears that the policicies are still held for the Varick Bank, and the transaction appears to me upon all the concessions here, to have no more significance than it would have had the Varick Bank, in form and with knowledge of the fact that bankruptcy proceedings were pending against its creditor, in which a received had been appointed, executed to itself, an absolute assignment of title to the policies. The trustee insists that the policies and each of them have in fact a larger commercial value than the amount proposed to be credited by the Varick Bank upon its claim secured thereby. Such a claim appears to be justified by the terms of the policies themselves. Whatever may be true with respect to the right of the bankrupt or of the trustee to redeem the policies, and whether or not any such right exists, need not be now determined. The creditor, the Varick Bank, is now in this Court still holding these policies, acquired in connection with certain loans, and seeking the aid of this Court in the collection of the balance of its claims which shall not be paid in full out of these policies. Before the creditor is entitled to that relief from this Court, it should satisfy this Court that the full value of the security held by it has been credited or will be, upon the total amount of its claims to which the same applies. I am not satisfied that such full value has been applied by or through the transaction shown as the disposition of the policies in form of a sale, to Mr. Delanoie. As the claim against the co-partnership include the notes set out in the claim against J. M. Mertens individually, I will reserve the question as to the allowance against the co-partnership for a subsequent determination.

As the proof now stands, I shall, therefore, decline to allow either claim as established against the estate or estates. The claimant may, however, if it so wishes, offer further evidence with a view of estab-

lishing the value of the pol-cies referred to which should be credited or allowed upon its claims against the bankrupt estates.

Mr. CZAKI: Then, as I understand it, we have the right to introduce further evidence upon either of these claim- if we so de-
116 sire, and that your Honor's decision is without prejudice to that right?

The REFEREE: Yes, you may proceed with any further evidence upon the subject, without prejudice to your right to review this decision as a preliminary question.

9. Thereupon the trustee asked the Court under Subdivision *h* of Section 57 of the Bankruptcy Act to direct a resale of the policies upon notice to the trustee, to which the claimant objected as not being authorized by the Bankruptcy Act or Practice. Subsequently the Referee granted such motion.

10. The claimant thereupon filed its petition to have the question certified to be reviewed by the District Judge, who on January 21, 1905, made an order affirming the ruling of the Referee without prejudice to the right of the Varick Bank to introduce further evidence as it might be advised. Said District Court held that the Bankruptcy Act and the filing of a petition in bankruptcy under the same operated as an injunction and prohibited the sale pending the adjudication and further that said sale as conducted was fraudulent. From that order an appeal was duly taken by the claimant to this Circuit Court of Appeals.

This Court finds as matters of law.

1. That the order made by the referee and by the District Court was a rejection of the claims of the Varick Bank.

2. That the policies in question did not belong to the partnership estate, and that the claim against the partnership should have been allowed in full.

3. That the sale of the policies under the facts as stipulated was a good and valid sale and passed a good and valid title to said policies to the Varick Bank.

4. That the value of said policies was properly liquidated by said sale under the terms of Section 57-*h* of the Bankruptcy Act and that under said Section the referee had no power to make the order
117 directing a resale thereof.

5. That said Bankruptcy Act did not suspend or enjoin the exercise of said power of sale during the time between the filing of the petition and the adjudication in bankruptcy.

6. That the claim against the individual estate of Jacob M. Mertens should be allowed in full.

7. That the burden of proving that said sale was unfair was upon the trustee.

That a decree in accordance with the above findings be made and entered and a mandate with instructions in accordance therewith be issued by the Clerk of this Court.

Dated this 22d day of March, 1906.

WM. J. WALLACE,
E. HENRY LACOMBE,
Judges Circuit Court of Appeals.

118 [Endorsed:] United States Circuit Court of Appeals, Second District. In the matter of Jacob M. Mertens *et al.*, Bankrupts, The Varick Bank of New York, Appellant. Findings of Fact and Law. Lewis & Crowley, Attorneys for Trustee. Office and Post Office Address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 22, 1906. William Parkin, Clerk.

119 United States Circuit Court of Appeals, for the Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; ALBERT K. HISCOCK, Trustee in Bankruptcy, Appellant, THE VARICK BANK OF NEW YORK, Appellee.

The above mentioned appellant respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals, for the Second Circuit, and that a judgment and decree has therein been rendered which was entered on the 4th day of March, 1906, and which reversed the decree of the District Court of the United States for the Northern District of New York, and that the claims against said bankrupt estates which are allowed by said judgment exceed in amount the sum of two thousand dollars each besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, your appellant prays that an appeal may be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellant, may be reviewed, and if error be found, corrected according to the laws of the United States and the customs thereof.

WILL B. CROWLEY,
Attorney for Appellant.

120 It is hereby ordered that the appeal in the foregoing petition mentioned, to the Supreme Court of the United States, be and it is hereby allowed as prayed.

WM. J. WALLACE,
U. S. Circuit Judge, Second Circuit.

March 22, 1906.

121 [Endorsed:] United States Circuit Court of Appeals: Second Circuit. In the Matter of Jacob M. Mertens *et al.*, Bankrupts, Albert K. Hiscock, Trustee in Bankruptcy, Appellant, The Varick Bank of New York, Appellee. Petition for Appeal and allowance thereof. Will B. Crowley, Attorney for Appellant. Office

and Post Office Address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 23, 1906. William Parkin, Clerk.

122 United States Circuit Court of Appeals, Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually, and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; ALBERT K. HISCOCK, Trustee in Bankruptcy, Appellant; THE VARICK BANK OF NEW YORK, Appellee.

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith the following for his assignment of errors as to which he alleges that the decree entered herein on the 4th day of March, 1906, is erroneous, to wit:

1. In holding that the order made by the referee in bankruptcy and by the District Court was a rejection of the claims of the Varick Bank.

2. In holding that the policies in question did not belong to the partnership estate, but did belong to the estate of Jacob M. Mertens, individually, and that the claim against the partnership should be allowed in full.

3. In holding that the alleged sale of the policies was a good and valid sale and passed a good and valid title thereto to the Varick Bank.

4. In holding that the value of said policies was properly liquidated under the terms of Section 57-*h* of the Bankruptcy Act, and in holding that the referee had no power to make the order directing a re-sale thereof.

5. In refusing to hold that said securities could not be sold or liquidated except pursuant to an order of the Court of bankruptcy.

6. In holding that the Bankruptcy Act did not suspend and enjoin the exercise of the power of sale contained in appel-
123 lant's notes during the interim between the filing of the petitio- and the adjudication in bankruptcy and in refusing to hold that any sale during that period was void.

7. In holding that the claim against the individual estate of Jacob M. Mertens should be allowed in full.

8. In holding that the burden of proving that the sale of said policies was unfair was upon the trustee.

9. In refusing to hold that it was within the discretion of the referee under Section 57-*d* of the Bankruptcy Act to refuse to allow said claims on the evidence presented, and to suspend the allowance of the partnership claim until the said securities had been properly liquidated.

10. In holding that there was no evidence that the policies in question had a larger value than that which was obtained on said sale therefor.

11. In reversing the decree of the Court below.

Wherefore, the appellant prays for an examination and correction of the errors assigned and for a judgment and decree reversing in all things the said judgment and decree of the Court of Appeals for the Second Circuit.

WILL B. CROWLEY,
Attorney for Appellant.

124 Endorsed: United States Circuit Court of Appeals: Second Circuit. In the Matter of Jacob M. Mertens, *et al.*, Bankrupts, Albert K. Hiscock, Trustee in Bankruptcy, Appellant, The Varick Bank of New York, Appellee. Assignment of Errors. Will B. Crowley, Attorney for Appellant. Office and post office address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 23, 1906. William Parkin, Clerk.

125 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 124 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Jacob M. Mertens *et al.*, Bankrupts, Varick Bank of New York, Appellants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of March, in the year of our Lord One Thousand Nine Hundred and Six and of the Independence of the said United States the One Hundred and Thirtieth.

[Seal United States Circuit Court of Appeals.]

WM. PARKIN, *Clerk.*

126 United States Circuit Court of Appeals, Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually, and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; ALBERT K. HISCOCK, Trustee in Bankruptcy, Appellant; THE VARICK BANK OF NEW YORK, Appellee.

To The Varick Bank of New York:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit,

wherein said Albert K. Hiscock, as trustee in bankruptcy, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William L. Wallace, Judge of the United States Circuit Court of Appeals for the Second Circuit, this 22nd day of March, 1906.

WM. J. WALLACE,
Judge of the United States Circuit Court of Appeals, Second Circuit.

Personal service of a copy of this citation is hereby admitted. Dated, March 24th, 1906.

FRIED AND CZAKI,
Solicitors for The Varick Bank of New York, Appellee.

127 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Jacob M. Mertens, *et al.*, Bankrupts, Albert K. Hiscock, Trustee in Bankruptcy, Appellant, The Varick Bank of New York, Appellee. Citation. Will B. Crowley, Attorney for Appellant. Office and post office address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 26, 1906. William Parkin, Clerk.

Endorsed on cover: File No. 20,167. U. S. circuit court appeals, 2d circuit. Term No. 244. Albert K. Hiscock, trustee in bankruptcy of Jacob M. Mertens *et al.*, bankrupts, appellant, *vs.* The Varick Bank of New York. Filed April 2d, 1906. File No. 20,167.

FILE COPY.

Office Supreme Court,
FILED.
OCT 22 1906
JAMES H. McKENN
Cl

No. 244.

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS, *et al.*, Bankrupts,
Appellant,

against

THE VARICK BANK OF NEW YORK,
Appellee.

Brief and Argument for Appellant on Motion to Dismiss.

WILL B. CROWLEY,
Counsel for Appellant,
20 White Memorial Building,
Syracuse, N. Y.

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of Jacob M. Mertens, *et al.*, Bankrupts,

Appellant,

against

THE VARICK BANK OF NEW YORK,

Appellee.

Brief for Appellant on Motion to Dismiss Appeal.

This is a motion by the appellee to dismiss the appeal or to affirm the judgment appealed from on the ground that the appeal is taken for delay only and is frivolous. The motion is not made upon any grounds claiming lack of jurisdiction.

FACTS.

The appeal is taken from a decree of the United States Circuit Court of Appeals for the Second Circuit, allow-

ing two claims filed by the Varick Bank against the bankrupts' estates, one claim having been allowed against the individual estate of J. M. Mertens in the amount of $9118.37, and the other claim having been allowed against the co-partnership estate of J. M. Mertens & Co. in the amount of $27,564.47, both being respectively the full amounts claimed by the Varick Bank. This decree of the Circuit Court of Appeals reversed the two tribunals which had previously passed upon the question at issue, namely, the Referee in Bankruptcy and the United States District Judge, both of whom held with the trustee.

On August 18, 1903, an involuntary petition in bankruptcy against J. M. Mertens & Company, a partnership, and against the individual members of that firm, composed of Jacob M. Mertens and his sons, was filed, and immediately thereafter the present trustee was appointed receiver of their estates and qualified as such. On September 15, 1903, an adjudication in bankruptcy was made against said partnership and said individuals. (p. 48.) At the time of the filing of the petition the Varick Bank, appellee, held a few customers' notes which Mertens & Company had discounted with it, amounting to about $5,000, and not very material to this discussion; but said Bank also held five notes, aggregating $22,500, all of which were for $5,000 each and were made by J. M. Mertens & Co., except one for $2500 on which Jacob M. Mertens, individually, was also maker. All of these notes were guaranteed (not endorsed in the legal sense) by J. M. Mertens & Co. and J. M. Mertens,

in a guaranty which appears on the back of each note. (pp. 49, 50.)

The Varick Bank also held two policies of life insurance in the Equitable Life Assurance Society of New York, both insuring the life of Jacob M. Mertens, one being in the amount of $50,000 and the other in the amount of $10,000. These were held by virtue of two assignments, which it will be noted contained no power of sale whatever.(p. 50.) They were also held by the Varick Bank under the terms of the said five notes, aggregating $22,500, each of which also contained on the face thereof (Fols. 7 and 8) an assignment of the policies in question with power of sale. All of these notes were on the same printed form. (p. 48.) At the time of the filing of the petition, the Varick Bank also held $6,000 in cash, which was on deposit to the individual account of J. M. Mertens. (p. 59.)

On September 14, 1903, while the receivership was still pending, the day before the adjudication was made, the Varick Bank (see stipulations, p. 63) without notice to anyone (3rd stipulation, Fol. 112) delivered these policies to its attorney, solicitor for the appellee in this case, and at the time of delivering the policies to its said attorney, and prior to said sale, said bank also gave to him its check which he cashed in bills to the amount of $10,250 (6th stipulation, p. 63.) The attorney then went to the New York Real Estate Sales Rooms and the policies were handed to an auctioneer there, where they were struck off on the bid of said attorney, it being the

only bid made and, as above said, no notice to anyone having been given, for the exact amount, $10,250, which said bank had given said attorney prior to the sale when it delivered to him the policies. The attorney bought them in the name of one Delanoie, no one else knowing of the sale and no one bidding except said attorney, although at this time the bank had actual notice of the receivership. It was conceded that Delanoie took the policies for the bank, that he still holds them for the bank; that immediately thereafter Delanoie pledged them to the Knickerbocker Trust Company for a loan of $10,250, the money from which was paid to the bank, and that subsequently he pledged them for a further loan from said Trust Company of $2,622.75. (pp. 63, 64.)

After this transaction the Varick Bank waited one year, lacking five days, from the adjudication (it will be remembered that claims not filed within one year after adjudication outlaw). During this time it did nothing, but on September 10, 1904, (the proofs of claim are not verified until September 9, 1904), it appeared in the Bankruptcy Court and filed the two proofs of claim, one as a secured claim against the individual estate for $9118.37, being the amount of the notes, less the $6,000 on deposit and also less the $10,250, the amount claimed to have been realized from the policies under the pretended sale; and said bank also filed another claim against the partnership as an unsecured claim for $27,564.47, although it will be carefully observed that the notes upon which the partnership claim is based are the

identical notes and indebtedness upon which the claim against J. M. Mertens individually is based. That partnership claim was consequently for the full amount of the notes, the Varick Bank claiming that it was not obliged to credit thereon the moneys which it had received from the deposit of $6,000 and from the pretended sale of the policies, amounting to $10,250. At the first subsequent meeting of creditors, when, these claims came up for the first time, the Trustee filed objections to each (Fols. 27 and 31), the substance of these objections being: 1. That the pretended sale was not a proper sale or any liquidation of the securities, and that the bank still held said policies as a pledge, the title thereto still remaining in the trustee. 2. That the indebtedness set forth in the claims had been partially paid, and that the debtors were not indebted in the amounts claimed, *i. e.*, that the full value of the policies must be realized and applied in payment. 3. That the sums realized from the policies and from off-setting the $6000 deposit should be credited also upon the partnership claim.

After the filing of these objections, the bank asked leave to file amended proofs of claim which was not done until December 1, 1904, (Fols. 34 and 35), and on the same day that the amended proofs of claim were filed the Trustee consented to proceed and did proceed with a hearing upon the issues (Fol. 35), which hearing was finished the following day.

At this hearing the claimant bank offered in evidence its proofs of claim and submitted sixteen stipulations of fact, all being done by the claimant voluntarily without

any contention that the burden of proceeding in the first instance was upon the trustee, no such contention being made until after the trustee had moved upon said stipulations of fact to disallow the claims (pp. 20, 21).

After these facts were in and *which are the very facts which show that the sale was a sham sale,* the bank asked the Court to allow the claims as filed and the trustee moved for a disallowance without resting his case or in any wise asserting that if the motion were not granted the trustee had finished his evidence (Fol. 38); and the Referee then made his decision (Fol. 39) in which he held that the pretended sale of the policies was sham and that their value had not been liquidated or ascertained, and that the bank, before it was entitled to any relief from this Court "should satisfy this Court that the full "value of the security held by it has been credited or will "be upon the total amount of its claims to which the same "applies." The Referee further said: "As the claim "against the co-partnership includes the notes set out in "the claim against J. M. Mertens individually, *I will "reserve the question as to the allowance against the co-"partnership for a subsequent determination."* The Referee then went on and expressly gave the bank the right to offer further evidence (bottom page 21) establishing the value of the policies and said, "You may pro-"ceed with any further evidence upon the subject without "prejudice to your right to review this decision *as a pre-"liminary question".*

It will be carefully noted that the Referee conse-

quently did not finally reject the claim of the bank as against the individual estate and that he did not pass at all upon the claim against the partnership estate. Also that *the Trustee did not rest his case* or in any wise take a position which would preclude him from the right to offer evidence himself upon the questions at issue, provided that the Referee had not decided the motion (Fols. 38 and 39) in his favor.

After this ruling by the Referee the trustee made a motion under Section 57-h of the Bankruptcy Act that the Court direct a method for liquidating the security by ordering the policies resold upon notice to the Trustee. The appellee asserts in its brief that the order made on this motion was an *ex parte* order. The record shows, however, (Fol. 41) that it was made in the counsel's presence; that he objected to the motion and specified his objections and that the Referee then reserved his decision until the bank should determine whether it would review the same. Subsequently the Referee having heard that the bank was to review his decision above mentioned, granted the motion made by the Trustee and directed that the liquidation be made by reselling the policies on notice to the trustee.

It will be noted that the Varick Bank did not appeal from this order made December 19th (Fol. 41) directing a resale of the policies on notice, but only appealed from the order made on December 2nd (Fols. 50 and 53).

On the petition for review, the case was heard before Hon. George W. Ray, District Judge, and he affirmed the

order of the Referee, in his opinion at page 23, still giving the appellee, however, the right to introduce further evidence; that is, it was still only a preliminary question (Fol. 51). The order of affirmance was made on January 21, 1905, and the bank then appealed to the Circuit Court of Appeals. Over a year had elapsed before the case was decided by the Circuit Court of Appeals on February 23, 1906, the latter Court reversing the two other tribunals (Fol. 78), and holding that the rulings of the Referee were final rejections of the claims (Fol. 79), and directing *that the claims be allowed in full.*

The findings of the Circuit Court of Appeals were not made until March 22, 1906, (Fols. 117 and 118) and on that very day the appeal to this court was perfected and allowed by Judge Wallace, presiding justice, and the one who wrote the opinion of reversal. The appellant at once filed the return on April 2, 1906, in this Court (Fol. 127) and furnished the funds to print the case, which has been done at the expense of the appellant.

Since the taking of this appeal in March, 1906, six months elapsed before notice of this motion was served and nearly one month more will elapse before it can be heard, when in the ordinary course of events, if we are correctly informed, the hearing upon the merits should ensue within four months more.

POINT I.

This Court has jurisdiction, and a federal question is involved. This motion is not based upon the claim that the Court has not jurisdiction.

Although the appellee does not make this motion on the ground that the Court has no jurisdiction and consequently we are probably not required at this time to substantiate this point, still briefly we cite the following to show there can be no doubt that a federal question is involved and that this Court has jurisdiction.

The decree from which the appeal is taken allowed both of the claims filed by the appellee in full (Fol. 117) and each of these claims is for more than $2,000. By Section 25-b-1 of the Bankruptcy Act, the right to appeal to this Court in such cases is given if the question involved could have been taken on appeal from the highest court of the State to the Supreme Court.

New York Co. Bank vs. Massey, 192 U. S., 138.

This case presents several questions which could have been taken to the Supreme Court from the highest court of the State, to-wit:

1. If the contention of the trustee is sustained the title to these policies still vests in him and we consequently have a question of the title to property under the Bankruptcy Act, which question has been decided adversely to the trustee.

2. It also involves the right of the appellant to parti-

cipate to the extent claimed in the property now in the hands of the trustee, that is, to receive a dividend upon a larger amount than the trustee claims he is entitled to; this also involves a property right under the Bankruptcy Act, which has been decided adversely to the trustee.

3. The litigation involves the construction of Section 57-h of the Bankruptcy Act and the right of the appellant to proceed to a liquidation of security without the order of the Bankruptcy Court; it also involves the construction of Subdivision d of said Section 57.

4. It also involves the right of the appellee to sell these policies pending the receivership and prior to the adjudication, whereas the trustee claims that during that receivership all acts in reference to the bankrupts' property were stayed as matter of law.

POINT II.

No delay has occurred on the part of the appellant. The appellee by neglecting to file its claims for a whole year precluded itself from making this motion on the ground of delay.

There is not a word in the moving papers to show that the appellant has caused any delay in the case, but the record shows that the appeal was taken on the same day on which the findings were prepared by the Circuit Court of Appeals, upon the decree from which

the appeal is taken (Fols. 117 and 120). Also it is true that the record was printed and paid for by the appellant as soon as the funds were requested by the Clerk and that the case is ready for argument as soon as reached.

On the other hand, it appears from the record *that the appellee waited one year, lacking five days, from the date of the adjudication, before it filed its claim*, there being no occasion for doing so. It also appears that the trustee consented to a hearing upon the issues and the issues were heard on the very day on which the amended proofs of claim were filed by the appellee (Fol. 35), and that a decision was rendered immediately. It also appears that since the perfection of this appeal in March, 1906, six months elapsed before notice of this motion to dismiss was served and a month longer will elapse before it will be submitted, making seven months in all, whereas, in the usual course of events not more than four months more should elapse before the hearing upon the merits.

Furthermore, we do not see how the appellee is injured in the meantime. It has the policies which are the source of contention and which the trustee asked to have resold on notice to him, and these policies will not mature until long after this litigation shall have been decided, because Mr. Mertens is still living and even the tontine period in the $50,000 policy, Exhibit G, does not expire until February 15, 1909 (Fol. 67).

POINT III.

The appeal is certainly not frivolous. There are several important and undecided questions which are involved, questions the decision of which will vitally concern the effectiveness of the Bankruptcy Act.

That the appeal is not frivolous would seem to be self-evident from the fact that the *issue in this case has been decided by the lower courts twice in favor of the appellant* as against once in favor of the appellee; that is, the Referee in Bankruptcy and also the District Judge both decided the case in favor of the appellant. This should be sufficient at least to show that there is a debatable question and one which is entitled to argument, as it is not to be presumed that the opinion of the two lower courts was without ground, especially after reading their opinions in the record (pages 21, 23), and also when it is called to mind that whether his decision be right or wrong the District Judge who decided the issue in favor of the appellant, an issue which involves a construction of the Bankruptcy Act, was one of those most prominently identified in Congress with the passage of that Act.

But without attempting to discuss all of the assignments of error, the following questions in the case, none of which has been decided adversely to the appellant by prior decisions of this Court, clearly show that the ap-

peal is not frivolous and that appellant is entitled to be heard on the merits:

A. Between the time of filing the petition and the adjudication, the bankruptcy proceedings themselves were an injunction against any sale of the policies in question. (Oth. cont. of cross.)

It will be remembered that the sale was made on September 14, 1903, the day before the adjudication, and that on August 19, 1903, the bank had actual notice of the proceedings (Tr. 110).

"The filing of the petition was a caveat to all the "world. It was in effect an attachment and injunction. "Thereafter all the property rights of the bankrupt were "ipso facto in abeyance until the final adjudication. "If they were in his favor they revived and were again "in full force. If it were against him, they were entirely "annulled as to him and vested in the assignee for the "purposes of the trust with which he was charged. The "bankruptcy became, as it were, for many purposes, still "the debtor. Thus, the title still in the bankrupt between the filing of the petition and the final adjudication is a title good [illegible] "neither the power of the court or the effect of the final "decree [illegible]"

[illegible]

[illegible]

The last two cases were cited by the District Court in its opinion (p. 26).

In Whitney vs. Wenman, this Court held that a lienor could not even with the consent of a receiver in bankruptcy take property which was subject to the lien; and it would consequently seem impossible for a lienor without the consent or knowledge of the receiver to take such property; but that is what the claimant did in this case.

The appellee attempts to escape these clear holdings of this Court by claiming that the time when the trustee takes title is different than under the former Act. But we claim otherwise, because by Sec. 70-a-5, which appellee wholly ignores, on adjudication the trustee takes title to all property which the bankrupt could have sold prior to the filing of the petition. And this view has been sustained by a decision of equal weight with the decision from which this appeal is taken.

State Bank of Chicago vs. Cox, 143 Fed. R., 91, C. C. A., 7th Circuit.

The two cases of Eyster vs. Gaff and Jerome vs. McCarter, relied upon by appellee are not in point. In the first case, a foreclosure of a real estate mortgage, the action was begun before bankruptcy and the bankrupt was made a party defendant. The sale was conducted under the decree of a competent court and did not occur *until after adjudication.* There is nothing in the reported case to show that the trustee did not have notice of the proceedings. The decision is based on the ground that he did not intervene and become a party which he

might have done, and upon grounds appearing at pages 524 and 525 of the opinion, grounds which are not applicable to the case at bar.

In the second case the appellee seeks to give to the decision much greater breadth than it is entitled to. The action was one for the foreclosure of a mortgage upon real estate. Some of the bonds secured by the mortgage had been pledged and the pledgees had sold them and they had passed to the ownership of innocent third parties. It does not appear as to whether the trustee in bankruptcy had notice of the sale or under what circumstances it was made, but it does appear that the sale was after the adjudication. All that this branch of the case holds is that the Bankruptcy Act did not deprive the pledgee of the right of sale. We do not claim that the Bankruptcy Act does deprive the pledgee of the right of sale, but we do say that his remedy is suspended by that Act, and is made subject to notice to and consent by the Court, which will direct the mode in which it is to be exercised. But there is nothing in the decision which shows what the pledgee must do in exercising that right and furthermore, the sale was not made during the period when, according to the late decisions of this Court, cited in this point, the bankruptcy proceedings would act as a stay. Furthermore, the pledgees still held some of the bonds. As to these, the Court held that they could be proved for the purposes of the foreclosure decree at the full amount, because the Court would see on a distribution of the moneys that they were properly applied. (page 740). And in the case cited there was no receiver

in bankruptcy who, pending the adjudication, was holding the property for the Court.

In other words, the property of the bankrupt, which secured the bonds and without which they were worthless was being administered by the Court, which in making the decision in question said the pledgee's rights would not be finally determined until distribution. But here, where the Court through its receiver had taken constructive possession of the policies, it is inconceivable that the Court, while it was proceeding to hold the estate for all the creditors, could suffer one creditor like the bank, to proceed to administer part of the estate without asking the Court's leave and without notice to it.

B. **The express terms of the promissory notes required the application of the value of the policies and the $6000 deposit on the partnership debt.** (2nd asst. of error.)

It will be remembered that the claim against the individual estate and the claim against the partnership estate are both based upon the same identical notes. The cases holding that collateral furnished by the individual member of a firm need not be applied upon the partnership debt have no applicability to the case at bar because the agreement of the parties provided otherwise.

The policies were held by the bank first, under the terms of the assignments (Fol. 93) which, as they contain no power of sale whatever, are not to be considered because as to them the sale was unquestionably void.

(Opinion of Judge Ray, Fol. 44.) The bank to sustain the sale must rely upon the notes; it does so and claims that the provisions of the notes must be strictly and literally construed.

The notes are all made by the partnership alone with one exception, the one for $2500 which is made by both the partnership and J. M. Mertens. They are all joint and several and are guaranteed (not endorsed) by a joint and several guaranty signed by the partnership and J. M. Mertens, which guaranty by its terms makes all provisions of the face of the notes part of the guaranty itself.

Now the last sentence of the notes which appears on page 4, being part of the very clause assigning the policies and providing for a sale thereof (which appellee claims must be literally enforced) provides that if a sale of the policies be made the proceeds may be applied on the liability *and that the undersigned, J. M. Mertens & Co., "agree to be and remain liable to the said holder for "any deficiency arising upon such sale or sales".* (Fol.8.) We claim this to be an agreement binding on the bank and making it obligatory on the bank to credit the moneys on the partnership as well as the individual debt.

Now as to the $6000 deposit which the bank seized (Fol. 25) and assumed to apply only on the individual claim, the only evidence in regard to this is contained in the proofs of claim. (Fols. 5, 25.) The bank failed to show any agreement under which it was held except the last clause contained in the notes (p. 5), and this clause

provided that any moneys so held should be applied in *"payment and extinguishment* of any obligations or liabilities of the undersigned," that is J. M. Mertens & Co.

Furthermore, as held by the District Court, there was no evidence that the policies did not belong to the partnership (Fol. 44.) The statement in appellee's brief that the trustee admitted that the policies belonged to J. M. Mertens is not correct. See the objections in full.

C. **The sale was a sham and constituted no liquidaton or evidence of the value of the policies. It appeared that they were worth more.** (3rd and 10th assts. of error.)

Appellee cites many cases which are claimed to hold that such a sale as the one in question is valid. But no case has ever held that a pledgee could himself purchase at a private sale held without notice to any one, and none of his citations will bear out such a proposition. These cases are commented on in the latter part of this point.

It will be remembered that no notice of said sale was given to anyone, which must necessarily mean that no one was present at the sale, except said bank's representative; that the bank bid the policies in for itself in Delanoie's name and still holds the policies; that at the time of said sham sale it had actual notice of the appointment of a receiver of the bankrupts.

All of these facts were expressly stipulated. It also appears from those stipulated facts that the sale was con-

ducted under the direction of the bank's attorney, who submits the brief for appellant on this argument; that prior to the sale the bank gave to its attorney the exact amount of money which was bid; that there was but one bid made, which was made by said claimant's attorney in the name of another person, Mr. Delanoie, who was not present at the sale; that the attorney handed the auctioneer the money so given to him, he having bid the exact amount of money which was given to him before the sale; that the attorney received in return from the auctioneer after the sale the same amount which the attorney had paid, less the auctioneer's fees, which amount was paid by a certified check to the order of the claimant.

We submit and intend to argue before the Court that these facts so stipulated were ample justification for and required the findings made by the Referee and the District Court to the effect that the *alleged sale was in fact no sale whatever,* and we ask the Court to read the clear and concise judgment of the Referee at page 21, and the opinion of the District Court at pages 45-47.

Furthermore, and contrary to the finding of the Court below, it appeared that the policies were worth more than was obtained at the alleged sale, because claimants stipulated that Delanoie borrowed shortly after the sale $2622.75 more than he paid for the policies, having previously borrowed the exact amount of his bid immediately after the sale; and from the terms of the $50,000 policy (Fol. 68) it appears that in 1909 the Company will pay for the surrender of that one policy $18823. "and in addition thereto the surplus apportioned by this

Society to this policy." Consequently the Varick Bank bought not a mere chance upon Mr. Mertens' life which, he being a man well along in years, would in case of his death immediately net it $50,000, so far as only one policy is concerned, but it bought a contract under which it was certain to receive in 1909, $18823., plus the surplus. From these provisions of the policies, the Referee was satisfied that they were worth more (Fol. 39.)

The mere fact that the Trustee was in court "for a resale" was sufficient to justify a court of equity in ordering a new sale, because the policies had not passed into the hands of a third person who had purchased at the sale; they were still the property of the Varick Bank and a resale on notice could not possibly hurt it, because it would be under no disadvantage whatever in bidding to the amount of the prior sale, while on the other hand, if a greater bid could be obtained both the claimant and the estate would be benefited to the extent of the extra amount bid.

None of the cases cited by the appellee are authorities which are applicable to the facts here, because it has always been an axiom of the law that it will protect a pledgor from the strict fulfillment of an unconscionable contract of pledge. The cases which appellee cites are all cases where the sale was made in a market, which was always open and which needed no advertisement, such as the New York Stock Exchange, but here we have a security seldom sold, the nature of which was not explained, a sale, of which no one had any notice, where only one bid

was made, a security which needed investigation as to the health, habits, age of the insured and the condition of the Company issuing the same, before a proper bid could be put in by anyone which, in fact, needed advertisement and notice, so that purchasers might have time to prepare themselves. There is not a single case in the books which has ever sustained any pretended sale of a pledge under such conditions as are shown by the stipulated facts, and the statement of the Referee to the effect that it had "no "more significance than it would have had the Varick "Bank in form and with knowledge of the fact that bank-"ruptcy proceedings were pending against its creditors in "which a receiver had been appointed, executed to itself "an absolute assignment of title to the policies."

The two cases cited on page 12 of appellee's brief have no bearing on this issue because in those cases the highest court of the State in which they arose had held the particular lien involved to be valid, whereas no New York court has held that the appellee made a valid sale, and indeed no New York decision in any case ever held such a transaction as this pretended sale valid.

In none of the cases cited on page 13 of appellee's brief, did the pledgee purchase except in Franklin National Bank vs. Newcombe, in which, however, the sale was at public auction, after advertisement, with others present and some other bids (p. 295) and after notice to the pledgor (p. 296). Not a case holds or suggests that a pledgee could himself purchase if the sale be without notice and without advertisement, because such a provision would put the pledgor at an unconscionable disad-

vantage, and would be against public policy which these very cases say would not be allowed.

The word "sale" in such a contract means that there must be some competition or a reasonable endeavor to get a good price. It is perfectly evident that no such effort was made by the appellee.

D. **No liquidation of securities held by a creditor, which is binding upon the Bankruptcy Court, can be made except as directed by the Court. The value of the securities has not been determined.** (4th, 5th and 9th assts. of error.)

Section 57-h of the Bankruptcy Act provides for the allowance of secured claims and the District Court found that the clause therein, "as the Court may direct", modified each method provided for ascertaining the value of the securities, including the case where the securities were to be sold under the terms of the agreement. This interpretation was reversed by the Circuit Court of Appeals, which held virtually that whether it wished to or not, the Bankruptcy Court could not interfere in a liquidation which was made pursuant to the terms of the agreement, even though such liquidation or sale be made after the bankruptcy proceedings had been instituted.

We claim that this decision is directly contrary to the late authority of this Court, namely,

Whitney vs. Wenman, 198 U. S., 539.

Unless the above case be an authority in our favor, it is certain that the question has never been decided by this Court against us, and it will be noted that although this is a motion to dismiss on the ground of frivolity, the appellant's argument under his Points IV and V cites not a single authority and is simply an argument upon the question itself.

But, whether the Court must direct the manner of liquidation or not, certainly the act provides that before having a claim allowed a secured creditor must deduct "the value of securities" held by him (Sec. 57-h.) And certainly the pretended sale under the facts stipulated, with no bidders, no notice, no explanation of the securities, did not show the value, and no court from the facts given could determine the value of the securities. And under Sec. 57-d the referee had the right, as he did, to require evidence of value before allowing the claims.

The clear consequences of upholding this decision would be that any person whose financial circumstances indicated that there could be no relief except by bankruptcy proceedings, could go to any bank or any individual as soon as such circumstances became apparent, that he could obtain a loan from such bank or individual upon a note similar to the notes in question and could pledge with that bank or individual as security therefor his most valuable assets; that after the bankruptcy proceeding was inaugurated, that bank or individual could make a sale of those securities in a manner similar to the pretended sale made by the Varick Bank without notice to the receiver, other creditors, or to any person, and

could bid in those securities at any price which the creditor making the sale saw fit, and that no matter what the equity was the Bankruptcy Court would be absolutely powerless in the premises. Such a construction would be the practical repeal of the provisions of the Bankruptcy Act against preferences. It would entail the grossest waste of the assets of insolvent estates, it would absolutely prevent the courts of bankruptcy from securing a fair and equitable division of the bankrupt's assets.

E. **The burden of proof was upon appellee to establish the value of the policies and to prove its case. It voluntarily assumed the burden of proof.** (8th asst. of error.)

The cases cited by appellee on its brief at page 23, chiefly Whitney vs. Dresser, 200 U. S., 532, are not in point for the reasons that,

1. They were not cases arising upon secured claims, and as the Act requires the application of the security before the claim can be proved, the creditor must necessarily first show the value of the security.

2. Whatever the rule might be in this respect in the first instance, it cannot be invoked by the appellee here, because on the hearing appellee voluntarily chose to proceed and did so by submitting the stipulations of fact.

3. From those stipulations it was clear that the claim was not entitled to allowance as the evidence stood.

No motion for the allowance of the claims was made until these stipulations were put in and upon them, the Trustee, without resting his case, moved for the disallowance of the claims, and the Referee then made his ruling.

But as heretofore shown under our argument at Point C, the value of the policies was not ascertained or shown under the facts submitted, while it did appear that they were worth more than appellee claimed.

F. **The claims should not have been allowed by the Circuit Court of Appeals. At most they should have been sent back to the Referee to hear any evidence the Trustee wished to submit.** (2nd and 7th assts. of error.)

This proposition is supported by a decision of the same Court which made the ruling complained of.

In re Livingston Co., 144 Fed. R., 971.

At folio 84 the Circuit Court of Appeals says: "If the "valuation in this case was unfair, the burden was on the "Trustee to prove the fact." Then the case should be sent back so that the Trustee could have an opportunity. Instead the claims were finally allowed.

Now after the stipulations of fact were submitted by appellee, which was before it asked to have the claims allowed, the Trustee immediately moved thereon without resting his case, for a disallowance, whereupon the ruling of the Referee was made. In the light of that ruling it was unnecessary for the Trustee to give any evidence of

value. To have done so would be equivalent to asking a defendant to give evidence after he had obtained a non-suit on the plaintiff's case; but if a non-suit is reversed it is always with a right to a new hearing, so that the defendant may have a chance to submit his case.

Now the partnership claim, which was on the same indebtedness as the individual claim, was not heard or considered by the Referee (Fol. 40), he holding, "I will re-"serve the question as to the allowance against the co-"partnership for a subsequent determination."

G. **In any event equity should direct a resale.**

This Court under its late decisions has ample power in the premises to equitably administer the right which the bankrupt had at the time when the petition was filed.

Whitney vs. Wenman, 198 U. S., 539.

It could do so in any event, but when, as here, the appellee is coming into court and asking a decree of the Court for an allowance of its claim for a deficiency upon the facts in question, certainly in granting the appellee's petition the Court has the right to say that all equities shall be considered.

Now the trustee asks for a resale of these policies on notice. Such a proceeding cannot possibly be harmful to the claimant, for the policies have not passed into the hands of third parties, making it difficult to get them back. They are still held by the Varick Bank (Fol. 113).

On a resale, no risk would be run by the bank and no damage suffered, because either the policies would bring less or they would bring more. If the bank bought them at a less figure than formerly it would suffer no damage, because it would have the policies and a larger claim against the funds in the hands of the trustee than it now has, and it need not allow the policies to go to a third party for a less sum than previously because it could without damage bid as much again as it did at the former sale. If, on the other hand, the policies brought more at a resale, then the estate would be benefited and the Varick Bank, which would get the additional proceeds, would be benefited; and this would be true in any event, unless the policies on the first sale brought a less price than they were really worth, and if this is true there can be no doubt that a resale should be ordered anyway.

It needs no citation to call to the attention of the Court that equity exercises a wide discretion in opening sales and that courts after long delays frequently reopen sales which are made under advertisement and notice, pursuant to the terms of their own decrees and after judgments of foreclosure with all parties interested have been obtained.

The motion to dismiss the appeal should be denied with costs.

WILL B. CROWLEY,
For Appellant.

FILE COPY.

Office Supreme Court, U. S.
FILED.
FEB 26 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & CO.," BANKRUPTS,

Appellant,

vs.

THE VARICK BANK OF NEW YORK.

No 244.

BRIEF FOR APPELLANT.

THIS IS AN APPEAL BY ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY, FROM A DECREE OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, MADE MARCH 22, 1906, WHICH DECREE REVERSED THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK, MADE BY HON. GEORGE W. RAY, DISTRICT JUDGE. THE DIS-

TRICT COURT HAD AFFIRMED THE RULING OF CHARLES L. STONE, REFEREE IN BANKRUPTCY, WHEREBY SAID REFEREE REFUSED TO ALLOW A CLAIM AGAINST THE ESTATE OF J. M. MERTENS INDIVIDUALLY, FILED BY THE APPELLEE, THE VARICK BANK OF NEW YORK, UNTIL FURTHER EVIDENCE BY THE CLAIMANT AS TO THE VALUE OF COLLATERAL HELD BY IT SHOULD BE GIVEN, AND SAID RULING OF THE REFEREE ALSO RESERVED FOR SUBSEQUENT DETERMINATION THE ALLOWANCE OF A CLAIM FILED BY SAID APPELLEE AGAINST THE CO-PARTNERSHIP OF J. M. MERTENS & CO., WHICH CLAIM WAS COMPOSED ALMOST WHOLLY OF THE SAME INDEBTEDNESS AS THAT EMBRACED IN THE CLAIM AGAINST J. M. MERTENS INDIVIDUALLY. THE CIRCUIT COURT OF APPEALS HELD THAT AN ALLEGED SALE OF THE COLLATERAL WITHOUT NOTICE TO THE RECEIVER IN BANKRUPTCY OR TO ANYONE ELSE AND WITHOUT LEAVE OF THE BANKRUPTCY COURT MADE AFTER THE FILING OF THE PETITION AND THE APPOINTMENT OF THE RECEIVER, AT WHICH SALE THE CLAIMANT ITSELF BOUGHT THE COLLATERAL, WAS A SUFFICIENT LIQUIDATION OF THE VALUE THEREOF, AND DIRECTED THE ALLOWANCE IN FULL OF BOTH OF THE CLAIMS AS FILED.

STATEMENT OF THE CASE.

On August 18, 1903, an involuntary petition in bankruptcy was filed against Jacob M. Mertens individually and against the co-partnership of J. M. Mertens & Co., which was composed of him and his sons. On that day Albert K. Hiscock, of Syracuse, N. Y., was appointed the receiver of both of the bankrupt estates. On Sep-

tember 15, 1903, the adjudication in bankruptcy was made and on October 14, 1903, said Albert K. Hiscock was elected and thereafter qualified as trustee. (Page 48).

At the time of the beginning of the bankruptcy proceeding the Varick Bank held five notes aggregating in amount $22,500, four being for $5,000 each and made by J. M. Mertens & Co., and the other being for $2500 and made by J. M. Mertens & Co. and Jacob M. Mertens, all five guaranteed, (not endorsed in the legal sense) by J. M. Mertens & Co. and Jacob M. Mertens, the one for $2500 being also guaranteed by Jennie Mertens, wife of Jacob M. The bank also held some business paper which Mertens & Co. had received from customers and which had been endorsed by the firm and by Jacob M. Mertens. (Pages 4-7). This business paper amounted to about $5,000, but except as it increases the amount of the claim of the bank, it is not particularly material to the legal points under discussion. The five notes above mentioned were all made upon a printed collateral form which appears at page 4 and by them two policies of insurance upon Mr. Mertens' life in the Equitable Life Assurance Society of New York were pledged as security. In some of these five notes, policy No. 252314 was pledged, in some, policy No. 417171 was pledged and in one, both policies were pledged. (Page 6).

Just prior to the expiration of a year subsequent to the adjudication of the bankrupts, in the month of Sep-

tember, 1904, the Varick Bank of New York filed two claims with the Referee in Bankruptcy, Charles L. Stone, of Syracuse, N. Y., against said estates. One claim was for $25489.62 against J. M. Mertens individually, alleging a set off to said amount of $6,000 from a deposit of J. M. Mertens' which was held by the claimant at the time of the bankruptcy proceedings, and also alleging that the claimant held at the time of the filing of the petition in bankruptcy as security and collateral (meaning the life insurance policies aforesaid) property of the bankrupts which was disposed of previous to the adjudication for the sum of $10221. and alleging a balance due from the estate of J. M. Mertens of $9,118.37. (Pages 3-7).

The other claim was for $27,564.47 against the copartnership estate and on the face of the claim was stated to be unsecured. It was for the total amount of all the notes without deduction of any sum. It will be observed carefully, however, that the notes upon which the partnership claim was based are with the exception of about $2400. the identical notes upon which the claim against J. M. Mertens individually was based. (Pages 1-6).

After the filing of these claims and at the first meeting of creditors thereafter at which it could be done, the trustee filed and served objections to both of them. (Pages 15, 16). At the hearing upon these objections, the claimant filed amended proofs of claim, it being agreed that the objections should apply to the amended claims. (Page 19).

The amended proofs of claim are for the same amounts, respectively, but set forth the notes more particularly than the original proofs of claim. It will be noted that the proof of claim against the partnership does not allege that the notes set forth therein and upon which the same were founded have not been paid. It contains the qualified statement "that no part of said debt has been paid by the said J. M. Mertens & Co." (Page 11). The amended proofs of claim also set forth specifically a general description of the collateral which was held for the payment thereof.

These amended proofs of claim allege that *both claims were secured* (Pages 11, 14). So that as to the claim against the partnership we have the original proof which on its face alleges that the claimant had no security for said debt (Page 2), while the amended proof of claim against the partnership alleges that claimant did have collateral security for the payment of said debt, qualifying the statement by alleging that it was deposited by J. M. Mertens individually. However, it will be noted carefully that all of the notes for $22,500, which constitute the bulk of the indebtedness in both claims, on the face thereof describe the insurance policies above and assign the same as security for the payment of said notes, all of which notes and assignments are signed by J. M. Mertens & Co. *So that it at once appeared to the Court from the basis of these claims themselves, namely, from the notes which constitute the chief part of the claims and which on their very face show that the claimant had security for both the individual and partnership*

claims, that that security had been assigned to the claimant by the partnership. (Pages 4-6).

After the proofs of claim and objections were filed as above detailed, the matter came on for hearing before the Referee on December 1, 1904. (Page 18). A stipulation as to sixteen matters of fact was then made. (Pages 19, 20). These stipulations were offered by claimant's attorney, as we hereafter contend, to supplement his proofs.

At this point we will simply call the Court's attention to the important feature that these facts as stipulated disclose that after the filing of the petition in bankruptcy, while the receiver was acting, and on the day before the adjudication, the Varick Bank, without notice to anyone (3d stipulation) placed these policies in the hands of an auctioneer at the real estate auction room in New York City and had him strike them off to the claimant Varick Bank in the name of one Delanoie (11th stipulation) for $10,250, no one else knowing of the sale and no one else bidding, and that at this time the Varick Bank had actual notice of the receivership (14th stipulation). This sale, it will be readily seen, was colorable only and must have been without effect.

After these stipulations, the attorney for the claimant rested without further proof as to the value of the securities and asked for the allowance of the claims, to which the trustee objected. Thereupon the Referee made the ruling which appears at page 21, and in which he says: "I do not think that the sale was a public sale in any fair

"interpretation of that phrase. It appears that the poli-
"cies are still held for the Varick Bank and the transac-
"tion appears to me upon all the concessions here to have
"no more significance than it would have, had the Varick
"Bank in form and with knowledge of the fact that bank-
"ruptcy proceedings were pending against its creditor in
"which a receiver has been appointed, executed to itself
"an absolute assignment of title to the policies." Then after stating that he is not satisfied with this evidence as to value, *the Referee reserved the consideration of the partnership claim, and declined to allow the individual claim on the evidence offered, but expressly gave the appellant the right to submit further evidence thereon.*

The Court will at once see that this ruling did not finally allow or reject the claims or either of them. The claimant asked for a review of this ruling, which was had before the District Court. The Court wrote an opinion thereon (page 23) and by order (page 27) affirmed the ruling of the Referee, *still reserving to the claimant the right to put in further evidence,* which right the claimant has not waived nor stipulated away. Subsequently the Referee, on the motion of counsel for trustee, under the power vested in him by Subdivision h of Section 57 of the Bankruptcy Act, ordered a re-sale of the policies (page 22), but from this order the claimant did not appeal.

The Circuit Court of Appeals, to which the claimant appealed, not only reversed the rulings of the Referee in Bankruptcy and of the District Court, but directed abso-

lutely the allowance of the claims in full as filed. An opinion was written which appears at page 42, and findings were made, which appear at page 48.

From that decision the trustee appealed to this Court and he alleges that the Circuit Court of Appeals committed error in refusing to hold the following propositions:

That the alleged sale was illegal and void:

1st, because the filing of the petition in bankruptcy enjoined the exercise of the power of sale in the interim between the filing of the petition and the adjudication of bankruptcy;

2nd, because the alleged sale, being made without notice, without competition, and the pledgee having become the purchaser, was not a bona fide sale, was a mere sham, was illegal at common law, and could not pass any title to the policies;

3rd, because no sale for the liquidation of the collateral could be held, except as directed and allowed by an order of the Bankruptcy Court.

That by the terms of the promissory notes, as well as by Section 68-a of the Bankruptcy Act and by the law of the application of payments, the $6,000 deposit and offset and any sums realized from the sale of the policies of insurance were required to be applied in reduction of both the partnership and individual claims

and that the claims could be allowed only for the balance; that the partnership claim could not be allowed in full.

That the value of the policies was not determined by said alleged sale and had never been liquidated as required by Section 57-h of the Bankruptcy Act.

That under the stipulated facts the Referee properly found that the policies had a larger value than was obtained on the alleged sale.

That under Section 57-d of the Bankruptcy Act the Referee in his discretion had the right to suspend the allowance of the claims until the value of the collateral had been proved more satisfactorily to him.

That under the stipulated facts the burden of proving that the sale and liquidation of the policies was fair and the fair measure of their value was upon the claimant and not upon the trustee.

That under the stipulated facts the policies were shown to have been furnished by the partnership estate.

That the ruling of the Referee was not a rejection of the claims; that they should not have been finally allowed, but in any event, should have been sent back to the Referee so that the trustee could be heard thereon.

POINT I. A Federal question is involved and the appeal is properly before this Court.

The decree from which the appeal is taken allowed both of the claims filed by the appellee in full (page 66) and each of these claims is for more than $2,000. By Section 25-b-1 of the Bankruptcy Act, the right to appeal to this Court in such cases is given if the question involved could have been taken on appeal from the highest court of the State to the Supreme Court.

New York Co. Bank vs. Massey, 192 U. S., 138.

This case presents several questions which could have been taken to the Supreme Court from the highest court of the State, to-wit:

1. If the contention of the trustee is sustained the title to these policies still vests in him and we consequently have a question of the title to property under the Bankruptcy Act which question has been decided adversly to the trustee.

2. It also involves the right of the appellant to participate to the extent claimed in the property now in the hands of the trustee, that is to receive a dividend upon a larger amount than the trustee claims he is entitled to; this also involves a property right under the Bankruptcy Act, which has been decided adversely to the trustee.

3. The litigation involves the construction of Section 57-h of the Bankruptcy Act and the right of the appellant to proceed to a liquidation of security without the

order of the Bankruptcy Court; it also involves the construction of Section 57-d.

4. It also involves the right of the appellee to sell these policies pending the receivership and prior to the adjudication, whereas the trustee claims that during that receivership all acts in reference to the bankrupts' property were stayed as matter of law.

POINT II. Between the time of filing the petition and the adjudication, the bankruptcy proceedings themselves were an injunction against any sale of the policies in question. After filing the petition, no sale could be held without leave of the Court.

The petition in bankruptcy was filed and a receiver was appointed on August 18, 1903, (page 48) and the adjudication was made September 15, 1903. The alleged sale of these policies, by which the bank claims to have liquidated the value and become the owner thereof, occurred September 14, 1903, the day before the adjudication. This pretended sale was made without leave of the Court and without notice to the receiver, to the bankrupts, or to anyone else (page 63), although the claimant had actual notice that the Court had appointed a receiver. (Page 64).

When the Court appointed the receiver it took into its own constructive possession all of the assets of the bankrupts' estates, including the equities which those estates

had in the policies in question, for their conservation in behalf of the creditors. That such was the policy of the Act, is shown by Subdivision 3 of Section 2, which provides:

> "Appoint receivers or the marshals, upon appli-
> "cation of parties in interest, in case the Courts
> "shall find it absolutely necessary, for the preserva-
> "tion of estates, to take charge of the property of
> "bankrupts after the filing of the petition and until
> "it is dismissed or the trustee is qualified."

And a bankruptcy proceeding is a proceeding *in rem*. *Hanover Nat. Bank vs. Moyses,* 186 U. S., 192.

It has been held by this Court time and time again that a sale of or interference with a bankrupt's property during the interim between the filing of the petition and the adjudication in bankruptcy is void.

"The filing of the petition was a caveat to all the "world. It was in effect an attachment and injunction. "Thereafter all the property rights of the debtor were "*ipso facto* in abeyance until the final adjudication. "If that were in his favor they revived and were again "in full force. If it were against him, they were extin-"guished as to him and vested in the assignee for the "purposes of the trust with which he was charged. The "bankrupt became, as it were, for many purposes, *civili-"ter mortuus.* Those who dealt with his property in the "interval between the filing of the petition and the final "adjudication, did so at their peril. They could limit

"neither the power of the cou t nor the effect of the final "exercise of its jurisdiction.'

Bank vs. Sherman, 101 U. S., 406.

The above doctrine has been sustained by this Court under the present Act in

Whitney vs. Wenman, 198 U. S., 539.
Bryan vs. Bernheimer, 181 U. S., 188.
Mueller vs. Nugent, 184 U. S., 1.

In Whitney vs. Wenman, this Court held that a lienor could not even with the consent of a receiver in bankruptcy take property which was subject to the lien; and it would consequently seem impossible for a lienor without the consent or knowledge of the receiver to take such property; but that is what the claimant did in this case. The Court says in part:

> "In the case of Mueller vs. Nugent, 184 U. S., 1. "this court recognized the power of the bankruptcy "court to compel the surrender of money or other "assets of the bankrupt in his possession *or that of "some one for him.* In that case the decisions in "Bardes vs. Hawarden Bank, White vs. Schloerb "and Bryan vs. Berheimer were reviewed by the "Chief Justice, who delivered the opinion of the "court, and it was held that *the filing of a petition "in bankruptcy is a caveat to all the world, and in "effect an attachment and injunction,* and that on "adjudication title to the bankrupt's estate became "vested in the trustee with actual or constructive "possession, and placed in the custody of the bankruptcy court." (Italics are ours).

The facts in Bryan vs. Bernheimer were as follows: The bankrupt had made a general assignment for the benefit of his creditors nine days before the filing of his petition in bankruptcy and the assignee sold the property after the adjudication in bankruptcy, but before the appointment of a trustee. The bankruptcy court held that the purchaser had no title to the bankrupt's estate.

The claim of appellant made below that some of the above cases are not in point, inasmuch as they do not relate to property held by an adverse claimant, is not well taken as is shown by the opinion in this last case, which says:

> "In the opinion in Bardes vs. Hawarden Bank,
> "178 U. S., 524, 538, it was indeed said: 'The
> " 'powers conferred on the courts of bankruptcy by
> " 'clause 3 of section 2, and by section 69, after the
> " 'filing of a petition in bankruptcy, and in case it
> " 'is necessary for the preservation of property of
> " 'the bankrupt, to authorize receivers or the mar-
> " 'shals to take charge of it until a trustee is ap-
> " 'pointed, can hardly be considered as authorizing
> " 'the forcible seizure of such property in the pos-
> " 'session of an adverse claimant, and have no bear-
> " 'ing upon the question in what courts the trustee
> " 'may sue him.' But the remark, 'can hardly be
> " 'considered as authorizing the forcible seizure of
> " 'such property in the possession of an adverse
> " 'claimant,' was an inadvertence, and upon a ques-
> "tion not arising in the case then before the Court,
> "which related exclusively to jurisdiction of a suit
> "by the trustee after his appointment."

Under the recent decisions of the Court above cited, it is perhaps superfluous, but we cite the following to show the strict adherence of the courts under all circumstances to the principle laid down above.

> "From the time of the filing of the bankrupt's "petition, the property was in the custody of the "Court, and at least, from the time of the appoint- "ment of the assignee, the possession of it by the "bankrupt was, in law, the possession of it by the "assignee. The taking of any of it under the mort- "gage was, after that time, unlawful, and a taking "of it from the custody of this Court, and an officer "thereof."
>
> *In re Rosenberg,* Fed. Cases, No. 12,055. Blatchford, J.

We call the Court's attention to the particularly clear and explicit case *In re* Phelps, Fed. Cases, No. 11,079. In that case the Court held that a mortgagee who proceeded in a State Court after the filing of the petition, with knowledge thereof, to foreclose without the permission of the bankruptcy court, was in contempt and the sale a nullity. By the filing of the petition all property *eo instanti* is in possession of the court. "That all the "estate and property of the bankrupt, and all his right "and title to and interest in the property, whether en- "cumbered or unencumbered, are in custodia legis, and "under the sole and exclusive jurisdiction and control of "the bankruptcy court in which the proceedings are had, "pending the proceedings from the filing of the petition "for adjudication to the close of the proceedings." All

liens are preserved but they "can be enforced only by di-"rection and authority and under the jurisdiction and "control of that court." These propositions "apply "equally to proceedings in the courts and proceedings in "*pais* for the enforcement of liens and other securities, "begun after the commencement of proceedings in bank-"ruptcy."

We also cite

Lee vs. Franklin Sav. Inst., Fed. Cases, No. 8188.
Conner vs. Long, 104 U. S., 244.
McHenry vs. La Societe Francaise, 95 U. S., 60.
Wiswall vs. Sampson, 14 How., 66.
State Bank vs. Cox, 143 Fed. R., 93.
In re Reynolds, 127 Fed. R., 762.
In re Brooks, 91 Fed. R., 509.
In re Antigo, 123 Fed. R., 254.
In re Gutman, 114 Fed. R., 1010.
In re Krinski, 112 Fed. R., 975.

The appellee in the court below sought to escape the force of these clear decisions of this Court by claiming that the rule is now different because the time when the trustee takes title is different than under the former Act. But such an attempt must be futile, in view of the fact that this Court has expressly held otherwise in Mueller vs. Nugent, cited above and quoted from below. Furthermore, by Section 70-a-5, which appellee wholly ignores, on adjudication the trustee takes title to all prop-

erty which the bankrupt could have sold prior to the filing of the petition. We quote the following from

State Bank of Chicago vs. Cox, 143 Fed. R., 91; C. C. A., 7th Circuit.

"The general purposes and scope of bankruptcy "enactments, to take and administer all of the assets "of the bankrupt for pro rata distribution to the "unsecured creditors, is well recognized. In con- "formity with this view the provisions of the pres- "ent act, alike with those of the former acts, are uni- "form—from Section 1, cl. 10 (30 Stat. 544—U. "S. Comp. St. 1901, p. 3418), to and including Sec- "tion 70, cl. 5, in fixing the date when the petition "was filed as the time bankruptcy jurisdiction is es- "tablished over the property then possessed by the "bankrupt, as the date from which the sequestration "of property becomes operative and with reference "to which the validity or invalidity of the various "transactions affecting the estate must be ascer- "tained. As well remarked by Mr. Chief Justice "Fuller,speaking for the Supreme Court,in Mueller "vs. Nugent, 184 U. S., 1, 14, 22 Sup. Ct., 269, 46 "L. Ed. 405:

" 'It is as true of the present law as it was of that " 'of 1867 that the filing of the petition is a caveat " 'to all the world, and in effect an attachment and " 'injunction (Bank vs. Sherman, 101 U. S., 403, " '25 L. Ed. 866), and on adjudication title to the " 'bankrupt's property became vested in the trustee " '(Secs. 70, 21e, 30 Stat. 565, 52 U. S., Comp. St.

" '1901, pp. 3451, 3430), with actual or construc-
" 'tive possession, and placed in the custody of the
" 'bankruptcy court.' "

"In this Court the view is clearly expressed in the "opinion by Judge Jenkins in *In re* Rodgers, 60 C. "C. A., 567, 578, 125 Fed., 169:

" 'The filing of the petition, followed by seizure
" 'and by adjudication in bankruptcy, is a seizure
" 'of the property by the law for the benefit of cred-
" 'itors, and an appropriation of it to the payment
" 'of the debts of the bankrupt. It is a seizure of
" 'the property by legal process, equal in rank to
" 'and of the same force and effect as by execution
" 'or attachment.' "

"In other words, it is the established doctrine that "bankruptcy proceedings are *in rem*, and when com- "menced all of the property then held by the bank- "rupt or for his use (aside from exemptions) is sub- "jected to the jurisdiction of the bankruptcy court, "and that, when bankruptcy is adjudicated, the se- "questration reaches all such property at least, and "becomes operative from the institution of proceed- "ings, as 'a caveat to all the world,' preventing in- "terference by attachments or other means in dero- "gation of the interests of the estate. *In re* Pekin "Plow Co., 50 C. C. A., 257, 259, 112 Fed., 308; "Chesapeake Shoe Co. vs. Seldner, 58 C. C. A., 261, "264, 122 Fed., 593; Loveland's Bankruptcy (2d "Ed.), 366; Collier on Bankruptcy (5th Ed.), 553.

"While title rests in the bankrupt up to adjudica-
"tion, and in form until a trustee qualifies, it is sub-
"ject to the pending sequestration, and no rights can
"be acquired thereunder which are not equally
"amenable. The formal title of the bankrupt to the
"estate passes to the trustee (Section 70-a) 'by
" 'operation of law' as of the date of adjudication,
"but the trustee is vested as well under subdivisions
"(4) and (5) with property transferred in fraud
"of creditors, and 'property which prior to the filing
"of the petition' the bankrupt 'could by any means
"have transferred' or which might have been levied
"upon and sold."

The court below based its decision upon the two cases of Eyster vs. Gaff, 91 U. S., 521, and Jerome vs. McCarter, 94 U. S., 735, but we submit that those cases are not in point.

In the first case, a foreclosure of a real estate mortgage, the action was begun before bankruptcy and the bankrupt was made a party defendant. The sale was conducted under the decree of a competent court and did not occur *until after adjudication. There is nothing in the reported case to show that the trustee did not have notice of the proceedings.* The decision is based on the ground that he did not intervene and become a party which he might have done, and upon grounds appearing at pages 524 and 525 of the opinion, grounds which are not applicable to the case at bar.

In the second case the appellee seeks to give to the de-

cision much greater breadth than it is entitled to. The action was one for the foreclosure of a mortgage upon real estate. Some of the bonds secured by the mortgage had been pledged and the pledgees had sold them and they had passed to the ownership of innocent third parties. *It does not appear as to whether the trustee in bankruptcy had notice of the sale or under what circumstances it was made, but it does appear that the sale was after the adjudication.* All that this branch of the case holds is that the Bankruptcy Act did not deprive the pledgee of the right of sale. We do not claim that the Bankruptcy Act does deprive the pledgee of the right of sale, but we do say that his remedy is suspended by that Act, and is made subject to notice to and consent by the Court, which will direct the mode in which it is to be exercised. But there is nothing in the decision which shows what the pledgee must do in exercising that right and furthermore, the sale was not made during the period when, according to the late decisions of this Court, cited in this point, the bankruptcy proceedings would act as a stay. Furthermore, the pledgees still held some of the bonds. As to these, the Court held that they could be proved for the purposes of the foreclosure decree at the full amount, because the Court would see on a distribution of the moneys that they were properly applied. (Page 740). And in the case cited there was no receiver in bankruptcy who, pending the adjudication, was holding the property for the Court.

In other words, the property of the bankrupt, which secured the bonds and without which they were worthless was being administered by the Court, which in making

the decision in question said the pledgee's rights would not be finally determined until distribution. But here, having through its receiver taken constructive possession of the policies, it is inconceivable that the Court, while proceeding to hold the estate for all the creditors, could suffer one creditor, like the bank, to proceed to administer part of the estate without asking the Court's leave and without notice to it, or its receiver.

That these two cases were not intended to hold that a pledgee could proceed to the sale of a pledge without notice after the institution of a bankruptcy proceeding against the pledgor, also appears from the cases of

McHenry vs. La Societe Francaise, 95 U. S., 60.

Bank vs. Sherman, 101 U. S., 406.

Conner vs. Long, 104 U. S., 229.

These cases were decided immediately after the two cases relied upon by the Court below, the first one at a time when both of the Justices who wrote the opinions in the two cases relied upon below were still members of the Court, and both of them concurred in this subsequent opinion, in which Justice Waite after quoting from Eyster vs. Gaff, said that an assignee may begin proceedings to adjust liens upon the property in his hands, but that " if he does not, the secured creditor who wishes to "make his security available must act; and, *having ob-* "*tained leave of the bankrupt court* to bring his action "for that purpose, he may proceed in the State Court, "&c. * * * Here *the necessary leave to sue was* "*obtained,* &c." (Italics ours).

We submit that this is an explicit holding that leave of the Court is necessary after bankruptcy proceedings are begun before a secured creditor can move.

At the time of the decision of the case of Conner vs. Long, nearly all of the members of the Court which decided the cases relied upon below, were still members of the Court, and the opinion clearly lays down the rule that although a lien be in existence at the time of the filing of a petition in bankruptcy, still a sale thereunder, if made after the filing of the petition, is void, and no title passes to the purchaser.

The Bankruptcy Act would be deprived of all effect if, in the interim, between the filing of the petition and the adjudication, a period when in legal contemplation the bankrupt is, as held in the above cases, *"civiliter mortuus"* and consequently there is no party to represent the interests of the debtor or his creditors, a person holding collateral security could transfer it to himself at his own price, or could, in any manner, even upon notice, dispose of the security.

POINT III. The pretended sale of the insurance policies held as collateral was a sham and was invalid at common law. It constituted no liquidation nor evidence of the value of the policies which, it appeared, were worth more.

After the filing of the objections to the claims, the

claimant voluntarily submitted to the Referee certain facts by way of the stipulations printed at page 19; so that the evidence and exhibits before the Referee in Bankruptcy consisted of the proofs of claim, and original notes upon which the same were based, the insurance policies and the facts which appeared in said stipulations. From these stipulated facts, it appears that on the day before the adjudication in bankruptcy the claimant handed the life insurance policies to its attorney, who on that day handed them to an auctioneer, directing the auctioneer to sell the same at public auction at the New York Real Estate Sales Rooms; that said auctioneer offered them for sale to the highest bidder on said day at said place; *that no notice of said sale was given* to anyone except said Varick Bank; that there was only one bid made which was made by the attorney for the claimant in the sum of $10,250 and in the name of Herbert M. Delanoie, who was not present; that the claimant had instructed said attorney to purchase said policies, if he purchased them, in the name of said Delanoie; that prior to the sale said claimant had given to said attorney the exact amount which was thereafter paid by him for the policies, plus the auctioneer's fees; that immediately thereafter said Delanoie obtained a loan on said policies for the amount of $10,250, and later a further loan for the amount of $2622.75; that at the time of said alleged sale the Varick Bank had actual notice that a receiver in bankruptcy had been appointed; *that said Delanoie acquired title and still holds said policies for said Varick Bank.*

We submit that these facts so stipulated were ample

justification for and required the finding made by the Referee and the District Court, to the effect that the alleged sale was in fact no sale whatever, and we ask the Court to read the clear and concise judgment of the Referee at page 20, and the opinion of the District Court at page 23.

The stipulation that no notice of said sale was given to anyone must necessarily mean that no one was present at the sale except said bank's representative. It was therefore a private sale at which the pledgee became the purchaser at its own price.

The validity of this sale must rest entirely upon the notes and the power of sale contained therein, because the assignments (Exhibits E and F) which were offered in evidence by the claimant (pages 33, 34) contain no power of sale. But we contend that provisions ostensibly authorizing such a sale, are absolutely contrary to public policy so that courts will not allow them to be carried out.

It is the law that a pledgee cannot become the purchaser of pledged securities except by the express permission of the pledgor, and it is also the law that a pledgee is a trustee for the benefit of the pledgor.

"That the pledgee of personal property occupies to-
"ward the pledgor somewhat of a fiduciary relation, by
"virtue of which, he being a trustee to sell, it becomes his
"duty to exercise his right of sale for the benefit of the
"pledgor."

Pauly vs. State Loan Co., 165 U. S., 620.
(Justice Harlan).

"By virtue of the pledge, the pledgee has the right by "law, on the default of the pledgor, to sell the property "pledged in satisfaction of the pledgor's obligation. As "in that transaction the pledgee is the vendor, he cannot "also be the vendee. In reference to the pledge and to "the pledgor, he occupies a fiduciary relation, by virtue "of which it becomes his duty to exercise his right of sale "for the benefit of the pledgor. He is in the position of "a trustee to sell, and is by a familiar maxim of equity "forbidden to purchase for his own use at his own sale."

Easton vs. German American Bank, 127 U. S., 537.

"Trustees and mortgagees, in the execution of their "powers, must use the utmost good faith toward all par- "ties in interest. This proposition cannot be too strongly "stated and enforced. They must act impartially for "every person who has any rights in the estate. * * * "They must use every effort to sell the estate under every "must exercise every discretion, so far as they have any, "possible advantage of time, place and publicity. They "in an intelligent and reasonable manner."

"They are scrutinized by courts with great care and "will not be sustained unless conducted with all fairness, "regularity and scrupulous integrity. * * * If "proper notices of the sale are not given, or if the pro- "ceedings are in any way contrary to justice and equity, "the sale will not be allowed to stand."

Perry on Trusts, 4th Ed., Sec. 602, o. x.

Such being the case it is absolutely impossible for a

pledgee to perform his duty to the pledgor at a private sale which is without notice and therefore without competition, which he conducts himself and at which he becomes the purchaser. It is a trait of human nature to wish to buy as cheaply as possible; that motive is in direct conflict with the pledgee's duty to the pledgor to make the property bring as much as possible; but the pledgee is both purchaser and seller and his interest on the one hand is diametrically opposed to his interest on the other. The law contains no instance where duty and interest are allowed to come into such a conflict. It is impossible in equity to allow the right to sell at private sale and the right to purchase to be joined together.

This was held to be the law in

Laclede Nat. Bank vs. Richardson, 156 Mo., 275. (Approved in *Jones on Pledges*, Sec. 635-a).

Certain promissory notes secured by mortgages on real estate were pledged by means of a collateral note similar to the notes in question here, providing that the pledgee might sell at public or private sale without notice and might itself become the purchaser. A sale was made after an advertisement thereof had been given. The Court held that although authorized to sell at public or private sale without notice and to purchase, still, "that "the bank held these securities in trust is undoubted. It, "therefore, became the imperative duty of the bank in ex- "ercising the rights conferred by the power of sale con- "tained in the collateral notes, to use the utmost good "faith."

"The trust relation occupied by the bank toward the "pledgor made it incumbent upon the former to obtain "the best possible price and to use every reasonable "means to obtain the full value of the pledged property. "The condition of the weather and the absence of any "considerable number of bidders, rendered an adjourn- "ment necessary in order to prevent a sacrifice of the se- "curities." The Court continues and holds that on account of the nature of the securities, time should be given and a long advertisement made, so that intending purchasers might look up the notes and the character of the securities furnished by the mortgages.

This language is particularly applicable to the securities in the case at bar, which certainly needed investigation before anyone could intelligently bid upon them. (See Judge Ray's opinion, page 25).

The above case also quotes the following case in which notes with similar provisions existed:

Dana vs. Buckeye C. & C. Co., 38 Ill. App., 371.

"It is an authority to sell at public or private sale, but "creditors in whom such authority is vested, cannot exer- "cise it otherwise than under a trust for other creditors' "benefit, as well as their own. * * * That a per- "son holding property upon securities in pledge, occupies "the relation of trustee for the owner, and as such, in the "absence of special power to do otherwise, is bound to "proceed as a prudent owner would do with his own."

Wherever courts have allowed a pledgee to bid, he has not been allowed to conduct the sale.

Jones on Pledges, Sec. 648.

Clauses inserted in the contracts of pledge providing that if the terms of the contract are not strictly fulfilled the pledge shall not be redeemable, have always been held of no avail, for the common law terms such a stipulation unconscionable and void upon the ground of public policy as tending to the oppression of the debtor.

Story on Bailments, Sec. 318-345.

If the power of sale in the notes in question is to be upheld and construed strictly in their broadest terms in favor of the pledgee, as is sought to be done here, then it is tatamount to depriving the pledgee of the right to redeem.

The Court below and the appellee in its behalf, sought to meet this proposition by citing a number of cases, the chief of which are Toplitz vs. Bauer and Baker vs. Drake.

But these authorities do not go to the extent claimed because while holding that a pledgee may stipulate for a sale without notice, they all make the important exception that he cannot make stipulations which are *"in contravention of a statute, against public policy or fraudulent."* This exception made in the authorities which the appellee relies upon seems clearly to cover this case.

None of the cases cited by the appellee are authorities

which are applicable to the facts here, because it has always been an axiom of the law that it will protect a pledgor from the strict fulfillment of an unconscionable contract of pledge. The cases which appellee cites are all cases where the sale was made in a market, which was always open and which needed no advertisement, such as the New York Stock Exchange, but here we have a security seldom sold, the nature of which was not explained, a sale of which no one had any notice, where only one bid was made, a security which needed investigation as to the health, habits, age of the insured and the condition of the company issuing the same, before a proper bid could be put in by anyone, a sale which, in fact, needed advertisement and notice, so that purchasers might have time to prepare themselves. There is not a single case in the books which has ever sustained any pretended sale of a pledge under such conditions as are shown by the stipulated facts, and the statement of the Referee to the effect that it had "no more significance than it "would have had the Varick Bank in form and with "knowledge of the fact that bankruptcy proceedings were "pending against its creditors in which a receiver had "been appointed, executed to itself an absolute assignment of title to the policies," is peculiarly applicable.

In none of the cases cited in appellee's brief below, did the pledgee purchase except in Franklin National Bank vs. Newcombe, in which, however, the sale was at public auction, after advertisement, with others present and some other bids (page 295) and after notice to the pledgor (p. 296), and except in the case of Fidelity In-

surance Co. vs. Roanoke, where the sale was of bonds, but was made at a stock exchange, that is, at a place especially devoted to the sale and purchase of securities and which from its very nature secured such competition as is ordinarily secured only by advertisement and notice.

Not a case holds or suggests that a pledgee could himself purchase if the sale be without notice and without advertisement, because such a provision would put the pledgor at an unconscionable disadvantage, and would be against public policy which these very cases say would not be allowed.

The word "sale" in such a contract means that there must be some competition or a reasonable endeavor to get a good price. It is perfectly evident that no such effort was made by the appellee.

Furthermore, and contrary to the finding of the Court below, it appeared that the policies were worth more than was obtained at the alleged sale, because claimants stipulated that Delanoie borrowed shortly after the sale $2622.75 more than he paid for the policies, having previously borrowed the exact amount of his bid immediately after the sale; and from the terms of the $50,000 policy (page. 36) it appears that in 1909 the company will pay for the surrender of that one policy $18823. "and in addition thereto the surplus apportioned by this "Society to this policy." Consequently the Varick Bank bought not a mere chance upon Mr. Mertens' life which,

he being a man well along in years, would in case of his death immediately net it $50,000, so far as only one policy is concerned, but it bought a contract under which it was certain to receive in 1909, $18823., plus the surplus. From these provisions of the policies, the Referee was satisfied that they were worth more. (Page 21).

The attention of the Court is called to the case arising in this same bankruptcy proceeding recently argued before this Court as No. 209 on the present calendar. A reference to that record, at page 24, will show that that case was tried before the same referee in bankruptcy, that this identical policy No. 417171 for $50,000 was involved, and that the testimony there given shows that it was worth at least $12000, or $5000 more than the claimant gave. The referee, of course, had this in mind, and he was familiar with the value of "the surplus" to be apportioned to policies of this nature.

A proceeding in bankruptcy is one proceeding, and he had a right to give that evidence consideration herein.

POINT IV. The $6000 deposit and the value of the policies should also be applied in reduction of the amount of the partnership claim. The express terms of the promissory notes so require. It did not appear that the policies belonged to J. M. Mertens.

If the Court should hold the alleged sale of the policies invalid, still it is important that a ruling be made by the

Court upon this point, inasmuch as the same question might arise after a proper re-sale of the policies.

Keeping in mind that the claim against the individual estate and the claim against the partnership estate are both based upon the same identical notes, we contend that the above proposition is correct for the following reasons:

AS TO THE $6,000 OFFSET.

It appears from the proofs of claim (pages 3 and 14) that the Varick Bank held $6,000 on deposit, which it assumed to apply on the individual claim without reducing the partnership claim. In the proofs of claim against the individual estate, both the original and amended, it is alleged, "That there are "no offsets or counterclaims to the same, except the sum "of six thousand ($6,000) dollars, held by said Varick "Bank of New York on deposit and as collateral security "at the time of the filing of the petition herein." Except for these allegations in the proofs of claim and the allegation on page 11 in the partnership claim that this sum was held for the individual account of J. M. Mertens, there is no evidence of any kind to show the terms or conditions upon which this money was deposited. Therefore the entire case, so far as the $6,000 is concerned, rests upon the allegations above set forth and upon the terms of the promissory notes which were produced before the Referee and were a part of the proofs of claim.

Such being the fact, it is evident that the $6,000 must

be applied in reduction of both the individual and the partnership claims for the following reasons:

1st. Each of the five collateral notes, aggregating $22,500, and composing the principal part of each claim, provided: "The undersigned do hereby authorize and "empower the said bank, (but no other holder) at its op- "tion, at any time, to appropriate and apply to the *pay- "ment and extinguishment of any obligations or liabili- "ties of the undersigned to it*, whether now existing or "hereafter contracted, any and all moneys now or here- "after in the hands of the said bank, on deposit or other- "wise, to the credit of or belonging to the undersigned, "whether the said obligations or liabilities are then due "or not due." (Page 5, italics ours). These notes are all signed by J. M. Mertens & Co., and the one for $2500, dated September 6, 1903, is also signed by J. M. Mertens. Each of these notes has also a guaranty printed upon the back and all of those guarantys are signed by the partnership and by J. M. Mertens individually, and the guaranty on the one for $2500 above mentioned, is also signed by Jennie Mertens. Each of these guarantys expressly assents to the terms and conditions upon the face of the notes, so that by the terms of these notes and guarantys, not only Mertens & Co., but J. M. Mertens contracted and stipulated that any moneys on deposit to the order of them or either of them, should be applied upon the *payment and extinguishment of the obligations of the undersigned," i. e., J. M. Mertens & Co.*, and the Varick Bank assented, and accepted said notes upon these terms. Certainly, such is the case if the Varick Bank in seizing this $6,000 acted upon the contract right

given it under the terms of the notes which are the only agreements relating to the $6,000.

2nd. If, on the other hand, the Varick Bank says that it did not act under the terms and conditions of the notes, but relied upon its naked legal right of offset, then in seizing this $6,000 it brought itself within Section 68-a of the Bankruptcy Act, which provides as follows:

> "In all cases of mutual debts or mutual credits "between the estate of a bankrupt and a creditor the "account shall be stated and one debt shall be set off "against the other, *and the balance only shall be "allowed* or paid." (Italics ours).

If the bank waived the terms of the notes and relied upon its legal rights to offset this deposit, then the time when the setoff was required to be made was at the time of the filing of the petition.

Collier on Bankruptcy, 4th Ed., 496.
In re City Bank, Fed. Cases, 2742.
Drake vs. Rollo, Fed. Cases, 4066.

Now, at the time of the filing of the petition, only two of the notes in the partnership claim were due, being the first two set forth in the tabulation on page 5, amounting to $700.90, and none of the notes in the individual claim were due. Under the law relating to the application of payments, as hereinafter cited, the bank would be compelled to apply this $6,000 upon the notes first due, which would *extinguish in toto* $6,000 of the notes and which would of course include the notes embraced

within the partnership claim, because there are none in the individual claim which are not also in the partnership claim. After such extinguishment, certainly no claim for a dividend from either partnership or individual assets could be legally proved by the Varick Bank.

AS TO THE PROCEEDS FROM THE POLICIES.

In case the Court should hold that the so-called sale of the policies which netted $10,250 was a valid sale and liquidation of that collateral, then it is also respectfully submitted that the proceeds of these policies were required to be applied in extinguishment of any indebtedness against the partnership, as well as against the individual estate, for the following reasons:

1. These policies were held by the Varick Bank under and by virtue of two assignments (pages 33, 34), and also under and by virtue of the terms of the five collateral promissory notes aggregating $22,500; but inasmuch as the assignments contain no power of sale whatever, the bank in selling the policies must have acted by virtue of the provisions of the promissory notes. Having acted under the terms prescribed by the notes, it became bound as to all things relating to said sale, including the application of the proceeds thereof, to observe the terms and conditions provided by said notes; the bank seeks to sustain this sale by asserting that the provisions thereof must be strictly and literally construed. It cannot insist upon some of these terms being strictly observed unless the others are strictly observed.

These notes, as above mentioned, aggregating $22,500, are five in number and all are signed by J. M. Mertens & Company, except the one for $2500, which is also signed by J. M. Mertens. On the back of each is a guaranty which is also signed by the partnership and by J. M. Mertens, the one for $2500 being also signed by Jennie Mertens. This guaranty, by its terms, assented to all of the provisions on the face of the notes.

Now, these notes on their face each contain this clause: "In case of sale for any cause, after deducting all costs "and expenses of every kind for collection, sale or de- "livery, the said holder may apply the residue of the pro- "ceeds of the sale or sales so made, *to pay* one or more or "all of the said liabilities to it or him as to it or him shall "seem proper, whether then due or not due, making "proper rebate for interest on liabilities not then due, "and returning the overplus, if any, *to the undersigned, "who agree to be and remain liable to the said holder for "any deficiency arising upon such sale or sales.*" (Italics ours).

We maintain that unquestionably this was and is a clear and express contract to which the bank, by accepting the notes and acting upon this power of sale contained therein, became a party and which bound it to the proposition that in case of a sale of the policies, not only J. M. Mertens & Company, who were the "undersigned" but also J. M. Mertens, were to remain liable only for *the deficiency* which remained after the application of the proceeds of the sale upon said notes; and that consequently the Varick Bank could have no claim against

the partnership for any amount greater than would be left after the application of the proceeds of that sale. The word "undersigned" in the clause, "The under-"signed, who agree to be and remain liable to the said "holder for any deficiency arising upon such sale or "sales," referred certainly to J. M. Mertens & Company, who were the only makers of four of these notes, J. M. Mertens being the only other maker upon any note and he only upon the one amounting to $2500.

2. Furthermore, at the time of the so-called sale, September 14, and also at the time of the adjudication which was but one day later, there was due on the partnership liability only the first ten notes set forth in the schedules at page 5, which aggregate in amount $13,530.47; and of the notes comprised in the individual liability set forth in the schedules at page 6, only the first five, aggregating in amount $11,738.54 were due; so that applying upon this indebtedness the $6,000 on deposit and the $173.21 also on deposit, which was applied upon the partnership debt (page 3) and the amount obtained from the so-called sale of $10,250, we have more than enough to *pay in full all the liabilities which were due at that time,* and leave a surplus as to the partnership claim of nearly $3,000, and as to the individual claim of nearly $5,000, for application upon the liability next becoming due.

While there are cases (but none in this Court) which hold that a creditor having a claim against a maker and also against an endorser or surety for the payment of a note, may prove his claim in full against either or both

parties without applying *any partial payments* made by either, still there is not an authority which holds that after the claimant has received moneys sufficient to *pay in full* his obligation, no matter whether said moneys come from the maker or from the endorser, he can prove his claim for any amount against the other. A payment in full of an obligation, whether made by the endorser or by some one else, must *absolutely extinguish it*, and thereafter no claim can be based thereon by the parties holding it.

The moneys received from the $6,000 deposit and the proceeds of the policies must have been applied in one of these two ways:

a. The Varick Bank must have made the application under the terms of the notes which, as shown above, stipulate for the entire extinguishment of the obligations, so far as those proceeds would go.

b. If the Varick Bank did not rely upon the terms of the notes, then the seizing of these moneys, both the deposit of $6,000 and the proceeds of the policies, was a payment involuntarily made by the debtor. The bank could therefore make no application of the proceeds, but it was left for the law to make the application.

Blackstone Bank vs. Hill, 10 Pick., 129.
Cage vs. Iler, 13 Miss., 410.
U. S. vs. Kirkpatrick, 9 Wheaton, 720.
Cowperthwaite vs. Sheffield, 1 Sandford, 416-453.
Larrabee vs. Lumbert, 32 Maine, 97.

If the law is to make the application, then it will make it upon those obligations first becoming due and will therefore completely extinguish and wipe out the notes first due, which in this case means it will extinguish all except the last three notes of the partnership claim.

"The law will not apply money received to the pay-
"ment of a debt not due, nor can such an application be
"made, except by express agreement of the parties."

Farwell vs. Importers' Bank, 90 N. Y., 490.

"In other words, each item of payment or credit is ap-
"plied in extinguishment of the earliest items of debt,
"until it is exhausted. This was the rule laid down in
"Clayton's case (1 Merivale R., 572, 604, 608); and it
"was recognized and acted upon by the Supreme Court
"of the United States, in U. S. vs. Kirkpatrick (9
"Wheaton R., 720, 737, 738); and by this Court in U.
"S. vs. Wardwell (5 Mason R., 82-87). In McDonnell
"vs. The Blackstone Canal Company (5 Mason R., 11),
"the doctrine was limited to debts antecedently due, and
"not applied to debts which were not due at the time of
"the payments or credits. This qualification is indis-
"pensable to the good sense of the rule, which is founded
"upon the apparent intentions of the parties; for it
"would be almost absurd to suppose that a man, owing to
"his creditor two debts, one of which was due, and the
"other not, should be presumed to intend to apply pay-
"ments, made to his creditor, in discharge of the debt not
"yet due, rather than to the debt actually due."

Gass vs. Stinson, 3 Sumner, 112.

The following is a case where, although the creditor had the right to apply the proceeds of collateral to present or future indebtedness, the Court held that the law would make the application on the earliest items.

Thompson vs. St. Nicholas Bank, 113 N. Y., 333.

In equity a general payment will be applied to the earliest items of indebtedness, though the creditor may hold security for that and not for the residue.

Truscott vs. King, 6 N. Y., 147.
U. S. vs. Kirkpatrick, 9 Wheaton, 720.
Nat. Park Bank vs. Seaboard Bank, 114 N. Y., 28.
Pond vs. Harwood, 139 N. Y., 125.
Larrabee vs. Lumbert, 32 Maine, 97.

Certainly there could be no equity in allowing the Varick Bank to so apply these payments that having obtained much more than would satisfy in full a majority of the demands, it could still claim that so far as the partnership debt went, the whole remained unpaid.

3. Under the facts of this case, we submit that the cases cited by the Court below as authorities for the allowance of the partnership claim in full without deduction of the proceeds of the policies, on the ground that being on the life of J. M. Mertens they were individual assets, are not in point and have no application to this case.

Those cases all relate to a security pledged or given by

the individual and received by the creditor from the individual to secure the individual's liability upon the indebtedness.

Here all the notes except the one for $2500 which was also signed by J. M. Mertens, but which was not due when the sale was made, were signed by the firm, which was the only maker thereof. Those notes contain specific assignments of the policies in question, which assignments were made by J. M. Mertens & Co.

The face of the obligations show that J. M. Mertens & Co. were putting up and pledging these policies and that the Varick Bank was accepting them from the firm of J. M. Mertens & Co., and not from J. M. Mertens. Consequently, the Varick Bank, although the policies were upon the life of J. M. Mertens, received, as shown by the notes in question, these policies from the firm and accepted them from the firm and sold them under an assignment and power of sale given by the firm. The policies were not put up by J. M. Mertens to secure his guaranty or his individual obligation, but they were at the outset pledged by and received from the firm to secure the debt of the firm. The notes show that the partnership had them, the partnership pledged them, the debtor received them from the partnership and stipulated and agreed to apply the proceeds upon the partnership debt, and J. M. Mertens, if he ever had any interest in the policies, by his adoption of the terms of these notes and the assignments by the firm therein contained, as shown by his guaranty, consented to the pledging of the policies by the

firm. Consequently, it must be assumed, even if the policies were upon the life of J. M. Mertens, that they had been taken out by the firm, or at least had become the firm's property and belonged to it.

This makes a much different case than where, by agreement, separate and distinct from the evidence of indebtedness by a firm, a partner puts up his individual assets. And the cases cited below, both in the opinion of the Court and by the appellee, are not applicable. Here we have a case where the very agreement upon which the indebtedness is made and which is made by the firm also pledges this property for the security thereof.

We further submit that under the facts above set forth it was error for the Court below to hold that the mere circumstance that J. M. Mertens' life was insured by the policy was evidence that it belonged to him. Such evidence, if it amounted to anything, was overcome and negatived by the fact that the notes which were made by J. M. Mertens & Co., which pledged these policies and contained the power of sale which was acted upon by the claimant, were made by J. M. Mertens & Co.

POINT V. No liquidation of securities which is binding upon the Bankruptcy Court, can be made by a creditor except as directed by the Court. The "value" of the securities was not determined and the Referee had the right under Section 57-d to refuse to be bound by the alleged sale.

Section 57-h of the Bankruptcy Act provides:

> "The value of securities held by secured creditors "shall be determined by converting the same into "money according to the terms of the agreement "pursuant to which such securities were delivered to "such creditors or by such creditors and the trustee "by agreement, arbitration, compromise, or litiga- "tion, as the court may direct, and the amount of "such value shall be credited upon such claims, and "a dividend shall be paid only on the unpaid bal- "ance."

The District Court held that the clause therein, "as "the Court may direct," modifies each method provided for ascertaining the value of the securities, including the case where the securities were to be sold under the terms of the agreement. This interpretation was reversed by the Circuit Court of Appeals, which held virtually that whether it wished to or not, the Bankruptcy Court could not intertere in a liquidation which was made pursuant to the terms of the agreement, even though such liquidation or sale be made after the bankruptcy proceedings have been instituted.

We claim that this decision is directly contrary to the late authority of this Court, namely,

Whitney vs. Wenman, 198 U. S., 539.

The goods in the case cited were seized pursuant to the terms of the agreement, but this Court did not hesitate to declare the seizure illegal, although the seizure was made with the assent of the receiver in bankruptcy.

It is quite essential, as we maintain, to the carrying out of the general scope and provisions of the Bankruptcy Act for the Court to follow the interpretation given to this section by Judge Ray and to hold that the words, "as the Court may direct," relate to every form of liquidation. Otherwise preferences can be easily accomplished.

Aside from the provisions of the statute, however, as a matter of practice, it was necessary for the appellee to have obtained the consent of the Court to the sale. Upon this point we cite

McHenry vs. Societe Francaise, 95 U. S., 60,

where the Court, speaking of the liquidation of securities, says:

"If he does not, the secured creditor, who wishes to "make his security available, must act; and having ob- "tained leave of the bankrupt court to bring his action "for that purpose, he may proceed in the State Court," &c. * * * "Here the necessary leave to sue was "obtained before the decree was rendered," &c.

But whether the Court must direct the manner of liquidation or not, certainly the act provides that before having a claim allowed a secured creditor must deduct *"the value of securities"* held by him (Sec. 57-h.) And certainly the pretended sale under the facts stipulated, with no bidders, no notice, no explanation of the securities, did not show *the value,* and no court from the facts given could determine the value of the securities.

The Referee had some discretion; he had a conscience to satisfy; he was required to ascertain the value and deduct it, and Section 57-d, which provides that the consideration of claims may "be continued for cause by the "Court upon its own motion," was ample authority for him to require further evidence of the value of the policies before allowing the claims.

This Court has recently held that this power can be exercised.

Whitney vs. Dresser, 200 U. S., 536.

The Court says: "Justice is secured by the power to "continue the consideration of a claim wherever it ap- "pears there is a good reason for it."

The clear consequences of upholding the decision below would be that any person whose financial circumstances indicated that there could be no relief except by bankruptcy proceedings, could go to any bank or any individual as soon as such circumstances became apparent, that he could obtain a loan from such bank or individual upon a note similar to the notes in question and could

pledge with that bank or individual as security therefor his most valuable assets; that after the bankruptcy proceeding was inaugurated, that bank or individual could make a sale of those securities in a manner similar to the pretended sale made by the Varick Bank without notice to the receiver, other creditors, or to any person, and could bid in those securities at any price which the creditor making the sale saw fit, and that no matter what the equity was, the Bankruptcy Court would be absolutely powerless in the premises. Such a construction would be the practical repeal of the provisions of the Bankruptcy Act against preferences. It would entail the grossest waste of the assets of insolvent estates, it would absolutely prevent the courts of bankruptcy from securing a fair and equitable division of the bankrupt's assets.

POINT VI. The burden of proof was upon appellee to establish the value of the policies and to prove its case. It voluntarily assumed the burden of proof.

The cases cited by appellee on its brief below, chiefly Whitney vs. Dresser, 200 U. S., 532, are not in point for the reasons that,

1. They were not cases arising upon secured claims, and as the Act requires the application of the security before the claim can be proved, the creditor must necessarily first show the value of the security.

Bankruptcy Act, Sec. 57-h.

2. Whatever the rule might be in this respect in the first instance, it cannot be invoked by the appellee here, because on the hearing appellee voluntarily chose to proceed and did so by submitting the stipulations of fact.

That the appellee itself submitted stipulations of fact and that it did not consider a case made out for the allowance of its claims until after those stipulations had been submitted, is conclusively shown by the fact that he did not ask the Court to allow his claims or to hold that the burden of proceeding was on the trustee *until after* those facts were stipulated, and by the fact that he then asked the trustee's attorney to state whether the trustee rested his case under the objections. If the stipulations had been offered as part of the trustee's case, the question asked would have been as to whether he rested his case under the *objections and stipulations of fact.* (Page 21).

No motion for the allowance of the claims was made until these stipulations were put in and upon them, the trustee, without resting his case, moved for the disallowance of the claims, and the Referee then made his ruling.

3. Those stipulations showed that the bank being in a trust relation toward the pledgor had itself purchased the property which was the subject of the pledge or trust. By so doing the bank became subject to the familiar rule that the burden of proof is upon the trustee who acquires the trust property, to show that his title is unimpeachable. In this case the burden was upon the bank to show that the sale of the policies and the price obtained therefor was fair. This the stipulations did not do.

4. From those stipulations, it was clear that the claim was not entitled to allowance, as the evidence stood, because there was no adequate evidence of value. Whatever evidence there was on this point was to the effect that the policies were worth more than the appellee claimed. The Referee was not satisfied with the evidence of value, and he had a right to require further evidence under the very authority which appellee cites, Whitney vs. Dresser, where the Court says: "Justice is "secured by the power to continue the consideration of a "claim whenever it appears there is good reason for it."

5. The original partnership proof of claim did not conform to the form prescribed by the Supreme Court. It alleged at the end that the bank had not received any security for said debt whatever, but qualified it by saying "from the said J. M. Mertens & Co." The amended partnership proof did not allege unqualifiedly that no part of said debt had not been paid, but qualified it by saying "by the said J. M. Mertens & Co.", and it alleged that the bank did have security for the debt but that the same was deposited by J. M. Mertens, whereas the notes, which were part of the claim, purported to show that J. M. Mertens & Co. in fact had pledged the securities; in other words, the claims taken together, individual and partnership, showed that they were contradictory; also it was not apparent to the Referee but that a sale of the securities properly made would be enough to cancel the partnership claim in full.

POINT VII. The claims should not have been allowed by the Circuit Court of Appeals. At most they should have been sent back to the Referee to hear any evidence the Trustee wished to submit.

This proposition is supported by a decision of the same Court which made the ruling complained of.

In re Livingston Co., 144 Fed. R., 971.

At page 46 the Circuit Court of Appeals says: "If "the valuation in this case was unfair, the burden was on "the Trustee to prove the fact." Then the case should be sent back so that the Trustee could have an opportunity. Instead the claims were finally allowed.

After the stipulations of fact were submitted by appellee, which was before it asked to have the claims allowed, the Trustee immediately moved thereon without resting his case, for a disallowance, whereupon the ruling of the Referee was made. In the light of that ruling it was unnecessary for the Trustee to give any evidence of value. To have done so would be equivalent to asking a defendant to give evidence after he had obtained a non-suit on the plaintiff's case; but if a non-suit is reversed it is always with a right to a new hearing, so that the defendant may have a chance to submit his case.

The partnership claim, which was on the same indebtedness as the individual claim, was not heard or considered by the Referee (page 21), he holding, "I will "reserve the question as to the allowance against the co-"partnership for a subsequent determination."

But this ruling was made with the express privilege to the claimant to submit further evidence (page 22) and the order of the District Court also gave this privilege to the appellee (page 27). With such a privilege given to the claimant, it is certainly unjust to deprive the trustee, as the decree below does, of the right to give evidence, he having had no opportunity to do so, and having had no opportunity to present the questions involved.

POINT VIII. In any event equity should direct a resale.

This Court under its late decisions has ample power in the premises to equitably administer the right which the bankrupt had at the time when the petition was filed.

Whitney vs. Wenman, 198 U. S., 539.

It could do so in any event, but when, as here, the appellee is coming into court and asking a decree of the Court for an allowance of its claim for a deficiency upon the facts in question, certainly in granting the appellee's petition the Court has the right to say that all equities shall be considered.

Now the trustee asks for a resale of these policies on notice. Such a proceeding cannot possibly be harmful to the claimant, for the policies have not passed into the hands of third parties, making it difficult to get them back. They are still held by the Varick Bank. (Page 64).

On a resale, no risk would be run by the bank and no damage suffered, because either the policies would bring less or they would bring more. If the bank bought them at a less figure than formerly it would suffer no damage, because it would have the policies and a larger claim against the funds in the hands of the trustee than it now has, and it need not allow the policies to go to a third party for a less sum than previously because it could without damage bid as much again as it did at the former sale. If, on the other hand, the policies brought more at a resale, then the estate would be benefited and the Varick Bank, which would get the additional proceeds, would be benefited; and this would be true in any event, unless the policies on the first sale brought a less price than they were really worth, and if this is true there can be no doubt that a resale should be ordered anyway.

It needs no citation to call to the attention of the Court that equity exercises a wide discretion in opening sales and that courts after long delays frequently reopen sales which are made under advertisement and notice, pursuant to the terms of their own decrees and after judgments of foreclosure with all parties interested have been obtained.

The alleged sale should be declared void; a new sale should be ordered upon notice to the trustee; the $6,000 deposit and the sums to be obtained from the policies should be required to be applied upon both claims in reduction of the amounts thereof; the decree of the Circuit Court of Appeals should be reversed and the decree of

the District Court affirmed with costs and such penalties for the unfair attitude of the claimant and the delay occasioned thereby as to the Court seems just; with the foregoing instructions the claims and cause should be remanded to the District Court to hear the other issues raised by the objections and to proceed accordingly.

All of which is respectfully submitted.

CEYLON H. LEWIS,
WILL B. CROWLEY,
Counsel for Appellant.

FILE COPY.

FILED
OCT 2 1906
JAMES H. McKENNEY,

No. 244.

Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS, et al, Bankrupts,

Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,

Defendant-in-Error.

Notice and Petition of Defendant in Error.

FREDERICK M. CZAKI,
Counsel for Defendant-in-Error.
11-19 William Street,
Manhattan, N. Y.

Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS *et al.*, Bankrupts,
Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,
Defendant in Error.

October Term, 1906. No. 244.

Sir.—You will please take notice, that upon all the proceedings had herein, the transcript of record filed in the office of the Clerk of this Court on the 2nd day of April, 1906, and the annexed petition of the Varick Bank of New York, the undersigned will respectfully move this Court at the October Term thereof, to be held at the Capitol in the City of Washington, District of Columbia, on the 22nd day of October, 1906, at 12 o'clock noon of said day, or as soon thereafter as counsel can be heard, for the entry of a rule or order which shall direct that the appeal or writ of error taken by the above named plaintiff in error, be dismissed, or in the alternative that the judgment, decree and mandate of the United States Circuit Court of Appeals for the Second Circuit, shall in all respects and things, be affirmed upon the

grounds and for the reasons as more particularly appear in said petition hereto annexed, and that the defendant in error be awarded costs and disbursements, and such further and other relief as may to this honorable court seem just and proper.

Dated New York, September 19th, 1906.

Yours, &c.,
FREDERICK M. CZAKI,
Solicitor for Defendant in Error,
Office and P. O. Address,
15 William Street,
New York City,
(Borough of Manhattan).

To WILL B. CROWLEY, Esq.,
Solicitor for Plaintiff in Error,
Office & P. O. Address,
White Memorial Building,
Syracuse, New York.

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS *et al.*, Bankrupts,
Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,
Defendant in Error.

October Term, 1906. No. 244.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of the Varick Bank of New York respectfully shows and alleges to this Honorable Court as follows:

I.—On August 18th, 1903, an involuntary petition in bankruptcy was filed against Jacob M. Mertens and others, composing the firm of J. M. Mertens & Co. On September 15th, 1903, the co-partnership and the individuals composing it, were adjudicated bankrupts, and on October 14th, 1903, the plaintiff in error was elected the trustee of the estates of both the co-partnership and the individuals.

II.—That at the time of the filing of the petition, the co-partnership was indebted to the defendant in error in the sum of Twenty-seven thousand eight hundred and ninety-three and 35/100 Dollars ($27,893.35). This indebtedness was predicated upon sundry promissory notes and bills receivable respectively consisting of two classes:

(1) Five collateral notes aggregating in amount Twenty-two thousand five hundred dollars ($22,500), made or endorsed by Jacob M. Mertens individually.

(2) The notes of third persons, firms or corporations endorsed by the co-partnership and by Jacob M. Mertens individually, which had been discounted by the defendant in error.

III.—All of the collateral notes were of the same form, differing merely as to the amount, date and property pledged as security. They contained the provision that upon default in the payment of any of the liabilities due from the makers to the defendant in error, the note and any and all other indebtedness became forthwith due and payable without demand or notice; full power and authority was given to the defendant in error to sell or dispose of the securities at public or private sale without demand, advertisement or notice of any kind which were expressly waived, and granted to the defendant in error the right to purchase at such sale, the makers and endorsers waiving any right of equity of redemption in the event of default and sale.

IV.—Pledged to secure the payment of these five collateral notes, were two policies of insurance upon the life of Jacob M. Mertens individually. One was for the sum of Fifty thousand ($50,000) Dollars, issued by the Equitable Life Assurance Society on the 15th of February, 1889, and No. 417171. It was payable to Jacob M. Mertens or his estate. It was known as a free Tontine policy, the Tontine dividend period expiring on the 15th day of February, 1909.

The second policy was for the sum of Ten thousand ($10,000) Dollars issued on the 21st day of

December, 1882. It was payable to Jennie Mertens, wife of Jacob M. Mertens, or in the event of her prior death, to the children of the insured. It was known as a Tontine Savings Bank policy, the Tontine period having expired on the 21st day of December, 1902, at which time under the terms of the policy, Mertens as the insured, had withdrawn in cash the share of the accumulated surplus, apportioned by the Society to the policy, and continued the policy in force on the ordinary plan. 13

V.—On the 16th of March, 1901, nearly two and a half years prior to the date of the filing of the petition in bankruptcy, Jennie Mertens and the children of Jacob M. Mertens and Jennie Mertens, executed an absolute assignment of the Ten thousand dollars policy to the defendant in error. On the 25th of March, 1901, this assignment was followed by a further assignment of the same policy by Mertens and his wife to the defendant in error. On the 21st of March, 1901, Jacob M. Mertens individually executed an assignment of the Fifty thousand dollar policy to the defendant in error. These assignments transferred to the defendant in error all of the interest of the insured and of the beneficiaries in the policies for the payment of the debts due or to be created by the co-partnership with the defendant in error, giving a right to the defendant in error to surrender the policies on default in the payment of the debts. 14 15

The policies were delivered to the defendant in error at or about the date of the assignments by Jacob M. Mertens and have since remained in its possession uninterruptedly.

VI.—On the day of the filing of the petition, obligations aggregating Sixteen hundred and ninety-one and 93/100 Dollars ($1,691.93) had ma-

16 tured and remained unpaid, and on September 15th, 1903, the day of the adjudication, obligations aggregating Thirteen thousand five hundred and thirty dollars and 47 cents ($13,530.47) had matured and remained unpaid. In the latter amount, was included two of these collateral notes of Five thousand Dollars each, both endorsed by Jacob M. Mertens individually, and quite $2,000 of the notes of third persons which had likewise been endorsed by Mertens individually.

VII.—On September 14th, 1903, subsequent to the filing of the petition in bankruptcy, and prior
17 to the adjudication, the defendant in error offered for sale and sold to the highest bidder at public auction by a duly licensed auctioneer at the New York Real Estate Sales Rooms in the City of New York, Borough of Manhattan, the two policies held as collateral security. The policies were sold separately. The Fifty thousand dollar policy was sold for Seven thousand Dollars, and the Ten thousand dollar policy for Thirty-two hundred and fifty dollars. Both policies were purchased by an agent of the defendant in error at its request and in its interests.

18 VIII.—On September 10th, 1904, the defendant in error filed as unsecured, a claim against the co-partnership estate for the sum of Twenty-seven thousand eight hundred and ninety-three and 85/100 Dollars ($27,893.85), and likewise a claim against the individual estate of Jacob M. Mertens as secured for the sum of Twenty-five thousand four hundred and eighty-nine and 62/100 Dollars ($25,489.62).

Subsequently and on December 1st, 1904, amended claims were filed, one against the co-partnership as unsecured for the same amount as the original

claim and another against the individual estate of Jacob M. Mertens as secured. This latter claim set forth the security which the defendant in error had theretofore held, its disposition in accordance with the terms of the contract under which the security had been pledged to it, the amount realized therefor, and the balance due, to wit, Nine thousand one hundred and eighteen and 37/100 Dollars ($9,118.37). 19

IX.—Prior to the filing of the amended claims, the plaintiff in error had filed objections to the allowance of the original proofs of claims, which as to the co-partnership claim, alleged in substance that the two policies were not the property of Jacob M. Mertens individually, but the property of the co-partnership, and hence that the defendant in error had failed to allege that it held these policies as security for the payment of that debt and had failed to credit their value. 20

The objections to the claim against the individual estate alleged that the value of the policies had not been ascertained as provided by Sub-division H of § 57 of the Bankrupt Law.

Upon the filing of the amended claims, it was stipulated that the objections filed to the original proofs of claim should stand as objections to the amended proofs. 21

X.—A hearing was had before the Referee upon the objections as thus filed, at which it was conceded by the plaintiff in error, that the policies were sold at public auction to the highest bidder as heretofore alleged; notwithstanding which, the Referee refused to allow either of the claims, and made an order *ex-parte* directing the defendant in error to resell the policies upon notice to the plaintiff in error.

XI.—Upon review before the District Court of the United States for the Northern District of New York, the disallowance of the claims by the Referee was affirmed, and an order was entered from which the defendant in error duly appealed to the United States Circuit Court of Appeals for the Second Circuit, wherein the order of the District Court of the United States for the Northern District of New York disallowing the claims of the defendant in error was in all respects and things reversed, and a mandate issued directing that the claims be allowed as filed. From this order and mandate of the United States Circuit Court of Appeals for the Second Circuit, the plaintiff in error has appealed to this Court.

XII.—That your petitioner verily believes and is so advised by its solicitor, that the said plaintiff in error has appealed to this court for the purpose of delay only. That all of the material questions presented by the assignments of error filed by the said plaintiff in error have been fully settled by prior decisions of this Honorable Court adversely to the contentions of the said plaintiff in error, that it is manifest that the appeal is taken for delay only, and that the assignments of error present questions so frivolous as to require no further argument before this Honorable Court.

WHEREFORE, for these and divers other reasons, as will more particular appear from the printed argument and brief of your petitioner's solicitor, your petitioner does respectfully pray this Honorable Court that a rule, order and decree be made and entered herein, which shall direct that the appeal of the plaintiff in error be dismissed, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit be affirmed with costs, and that your petitioner have such

further and other relief as to this Honorable Court may seem just, meet and proper. 25

And your petitioner will ever pray.

VARICK BANK OF NEW YORK,
JOHN T. SPROULL, Prest.,
Petitioner.

FREDERICK M. CZAKI,
Solicitor for Petitioner,
Office & P. O. Address,
15 William Street,
New York City.

26

STATE OF NEW YORK, }
City and County of New York. }

JOHN T. SPROULL, being duly sworn, deposes and says: That he has read the foregoing petition and knows the contents thereof. That the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That your deponent is the President of the Varick Bank of New York, and the reason this verification is made by your deponent is because the petitioner is a corporation. 27

JOHN T. SPROULL.

Sworn to before me this }
27th day of September, 1906. }
~~J. H. Donzelon,~~ Conrad Krug
Notary Public, no. 75.
(SEAL) New York County.

FILE COPY.

No. 244.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
OCT 2 1906
JAMES H. McKENNEY,

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB MERTENS, et al, Bankrupts,

Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,

Defendant-in-Error.

Brief and Argument of Defendant in Error.

FREDERICK M. CZAKI,
Counsel for Defendant-in-Error.
11-19 William Street,
Manhattan, N. Y.

SUPREME COURT OF THE UNITED STATES,

ALBERT K. HISCOCK, as trustee in Bankruptcy of Jacob M. Mertens *et al*, Bankrupts,
Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,
Defendant in Error.

Brief and Argument of Defendant in Error.

STATEMENT.

This is a motion made by the defendant in error to dismiss the appeal taken by the plaintiff in error, or in the alternative to affirm the judgment of the United States Circuit Court of Appeals for the Second Circuit, upon the ground that it is manifest that the appeal was taken for delay only, the questions presented by the assignments of error having all been decided adversely to the plaintiff in error by prior authoritative decisions of this Court.

Facts.

Concisely stated, the transcript of the record discloses that on August 18th, 1903, an involuntary petition in bankruptcy was filed against the firm of J. M. Mertens & Co., and the individual members composing it. They were adjudicated such on the 15th of September following, and thereafter and on October 14th following, the plaintiff in error was elected as trustee in bankruptcy of both the copartnership and the individual estates (fol. 89).

At the time of the filing of the petition in bankruptcy, the copartnership and Jacob M. Mertens, its senior member, were indebted to the bank in an amount exceeding Thirty-five thousand dollars ($35,000) (fol. 89). Of this amount Twenty-two thousand five hundred dollars ($22,500) was evidenced by five collateral promissory notes, each executed upon a like form, and which contained an absolute power of sale in the event of default in the payment of any of the obligations held by the bank, and granting it power to sell the same at public or private sale with or without notice, and to become the purchaser thereof at any such sale freed of the equity of redemption of the pledgors (fols. 90-91).

Jacob M. Mertens individually was either a maker or endorser on all of these collateral notes.

As security for the payment of these notes, and the other indebtedness held by the bank Jacob M. Mertens individually pledged two policies of insurance upon his life, one of Fifty thousand dollars, and the other of Ten thousand dollars (fols. 94-100).

On August 18th, the date of the filing of the petition, obligations aggrevating Sixteen hundred and ninety-one and 93/100 Dollars ($1691.93) en-

dorsed by Jacob M. Mertens had matured and remained unpaid, and on September 15th, 1904, the day of the adjudication, obligations aggregating in the amount of Thirteen thousand five hundred and seventy and 47/100 Dollars ($13570.47) had matured and remained unpaid. In the latter amount was included two of these collateral notes of Five thousand Dollars each, both endorsed by Jacob M. Mertens individually, and quite Two thousand Dollars of the notes of third persons which were likewise endorsed by Jacob M. Mertens, individually (fols. 9-11).

On the 14th day of September, 1903, the Bank caused these two policies to be sold at public auction to the highest bidder by a duly licensed auctioneer at the New York Real Estate Sales Rooms in the City of New York, Borough of Manhattan, the same having been purchased by an agent of the bank at its request and in its interests (fols. 111-114).

Thereafter the bank filed with the Referee in charge of the proceedings, two proofs of claim, one against the copartnership estate as unsecured aggregating Twenty-seven thousand eight hundred and ninety-three and 85-100 Dollars ($27,893.85), and another against the individual estate of Jacob M. Mertens for the sum of Nine thousand one hundred and eighteen and 37/100 Dollars ($9118.37) as secured (fols. 5-20).

Objections were filed to both of these claims by the plaintiff in error, which in substance alleged that the sale of the policies was illegal, that the value of the securities held by the bank had not been ascertained as required by the Bankrupt Act, and that the policies were still held by the bank as collateral to the said indebtedness, the plaintiff in error still owning the equity (fols. 27-33).

Thereafter the claims were amended to overcome some of the immaterial objections filed (fols. 13-26), and the objections filed to the original proofs of debt were considered as filed to the amended proofs (fol. 35).

A hearing was thereupon had before the Referee, and it was then mutually *conceded that the two policies were delivered to a duly licensed auctioneer by the attorneys and agents of the bank with instructions to sell the same at public auction at the New York Real Estate Sales Rooms on the 14th day of September, 1902, to the highest bidder. That the policies were thus offered for sale and sold to the highest bidder,* the Fifty thousand Dollar policy for the sum of Seven thousand dollars, and the Ten thousand dollar policy for the sum of Thirty-two hundred and fifty dollars ($3250).

It was further conceded that no notice of the sale was given to any one except the bank (fols. 35-38).

No other evidence whatsoever was offered by the plaintiff in error upon the hearing before the Referee under the objections.

The solicitor for the defendant in error thereupon requested to know of the trustee and his solicitor, whether they rested their case under the objections as filed to the proofs of claim of the plaintiff in error. Receiving no response, the solicitor for the defendant in error moved that the referee decide that the burden of proof in the proceeding was upon the trustee (fols. 38-39).

Thereupon the referee held in substance, that the sale of the policies by the defendant in error as disclosed by the record, was fraudulent and void. That the value of the securities had not been ascertained in accordance with the provisions of § 57, Sub-division H of the Bankrupt Law, and

refused to allow either claim as established against the estate or estates (fols. 39-40).

Thereupon the counsel for the plaintiff in error moved the referee to direct a method by which the security held by the defendant in error should be liquidated, and that in so doing, he direct the bank to re-sell the policies upon notice to the trustee.

Objection was taken to this motion, and thereafter, the referee granted the motion and noted an exception in favor of the defendant in error (fol. 41).

Thereupon the defendant in error petitioned for a review of the ruling and determination of the referee before the District Court of the United States for the Northern District of New York, as the result of which, the Referee's ruling disallowing the claims was approved and affirmed in a memorandum of opinion (fols. 42-49), 134 Fed. Rep., 101, and an order thereupon entered in accordance with the learned District Judge's opinion (fols. 50-51).

From the order of the District Court affirming the Referee's rulings disallowing these claims, the defendant in error appealed to the United States Circuit Court of Appeals for the Second Circuit, as the result of which the determination of the District Court was in all respects reversed in a memorandum of opinion handed down by the presiding justice (fols. 78-87), 144 Fed. Rep., 818, and an order and mandate thereafter issued to the District Court with instructions to proceed conformably with the opinion of the Circuit Court of Appeals.

Thereupon the plaintiff in error appealed to this Court, and assigns as error—

First.—That the order made by the Referee and the District Court was not a rejection of the claims of the defendant in error.

Second.—That the policies in question were the property of the co-partnership estate, and not the individual estate of Jacob M. Mertens, and hence that the United States Circuit Court of Appeals erred in directing the allowance of the copartnership claim in full.

Third.—In holding that the sale of the policies was a good and valid sale, and passed a good and valid title thereto to the defendant in error.

Fourth.—In holding that the value of the securities had been properly liquidated under the terms of the provisions of § 57, Subdivision H, of the Bankrupt Act.

Fifth.—In refusing to hold that the policies could not be liquidated or sold except pursuant to an order of the Court.

Sixth.—In holding that the Bankrupt Act did not suspend and enjoin the exercise of the power of sale contained in the collateral notes, intermediate the date of the filing of the petition in bankruptcy and the adjudication, and that the sale thus held was *ipso facto* void.

Seventh.—In holding that the claim against the individual estate should be allowed in full.

Eighth.—In holding that the burden of proof that the sale of the policies was unfair, was upon the plaintiff in error.

Ninth.—In refusing to hold that it was discretionary with the Referee to refuse to allow the claims presented, or to suspend their allowance.

Tenth.—In holding that there was no evidence that the policies had a larger value than was obtained at the sale.

POINTS.

I.

The first assignment of error, that the determination of the Referee and the District Court was not tantamount to a rejection of the claims of the defendant in error, is frivolous.

The Referee in disallowing the claims said:

> "As the proof now stands, *I shall therefore decline to allow either claim* as established against the estate or estates" (fol. 40) (italics ours).

Upon review the learned District Judge in his opinion stated:

> "Objections having been filed by the trustee to the allowance of each claim mainly on the ground that the value of such collateral had not been properly ascertained or credited, and that the value of the policies had not been ascertained as provided by Subdivision H, § 57 of the Bankrupt Act, *the Referee disallowed both claims as matters stand,* and made an order prescribing the method for ascertaining the value of such securities" (fol. 43) (italics ours).

The conclusion of the learned District Judge is stated at the end of his opinion as follows:

> *"The orders of the Referee disallowing the claims are approved and affirmed"* (fol. 49) (italics ours).

The order entered upon the opinion of the District Judge provides:

> "Ordered that the ruling of the said Referee rendered herein on the 2nd day of December, 1904, be and the same hereby is in all respects and things approved and affirmed" (fol. 51).

The Honorable Presiding Justice of the Circuit Court of Appeals in writing the opinion of the Court said:

> "We entertain no doubt that the order appealed from was in substance and effect a rejection of the claims such as to authorize an appeal pursuant to § 25 of the Bankrupt Act as well as a review pursuant to § 24. The bank insisted that its claims were for a definite amount, the amount stated in its proofs of debt, less the amount which it had already derived from the sale of the securities. *The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction"* (fol. 79) (italics ours).

II.

The second assignment of error, that the Circuit Court of Appeals erred in holding that the policies in question did not belong to the co-partnership estate, is likewise frivolous.

Both the original and the amended proofs of

claim affirmatively alleged that the policies in question were the property of the individual estate of Jacob M. Mertens, and were by him deposited with the defendant in error as collateral security for the payment of the debts of the copartnership and of the individual. The original individual proof of debt alleged:

> "And that at the time of the filing of the petition in bankruptcy, said Varick Bank of New York held as collateral security *property of the said bankrupt* (*Jacob M. Mertens*), which property according to the terms of the agreement under which the same was pledged, and previous to the date of the adjudication and the appointment or election of the trustee herein, was converted into money, etc." (fol. 5) (italics ours).

The amended copartnership claim alleged:

> "That at the time of the filing of the said petition, the said Varick Bank of New York held as collateral security for the payment of the said debt, *which said collateral was deposited by Jacob M. Mertens individually*, the following described property, to wit:" (fol. 20) (italics ours).

The Fifty thousand dollar policy was payable to Jacob M. Mertens or his estate, and was assigned by him to the defendant in error on the 21st day of March, 1901, more than two and a half years prior to the filing of the petition in bankruptcy (see Exhibit E & G, fols. 62-65).

The Ten thousand dollar policy was payable to Jennie Mertens, wife of Jacob M. Mertens, or in the event of her prior death, to the children of Jennie and Jacob (see Ex. H, fol. 69).

This policy was assigned by Jennie Mertens and the children of Jacob and Jennie, to the de-

fendant in error on the 16th day of March, 1901 (fol. 73), and was individually assigned by Jennie Mertens to the defendant in error on the 25th day of March, 1901 (see Ex. F, fol. 64).

These assignments transferred to the defendant in error all of the interest of the insured or the beneficiaries in the policies, for the payment of the debts due or to be created by the copartnership with the defendant in error, and gave the defendant in error the right to surrender them upon default of the payment of the indebtedness.

The plaintiff in error specifically admitted in his objections to the copartnership debt, that the policies in question were the property of Jacob M. Mertens individually, and had been deposited by him with the defendant in error.

> "Said claim is further objected to on the ground that certain payments have been credited thereon by Jacob M. Mertens, individually, *and certain credits should have been made thereon on account of collateral securities furnished to said bank by Jacob M. Mertens for the payment thereof*" (fol. 29) (italics ours).

The plaintiff in error offered no proof whatever tending to sustain his contention that the copartnership had any interest whatsoever in these policies.

The learned presiding justice of the Circuit Court of Appeals upon this point says:

> "There was no evidence tending to show that the policies belonged to the copartnership, except the circumstance that on one occasion the partnership made an agreement pledging them to the bank for the payment of a partnership note, and all other liabilities to the bank which might thereafter arise. As

the policies insured the life of Jacob M. Mertens, and were payable one to him or to his legal representatives, and the other to his wife or surviving children, and to him in the event of their death before his, the legitimate presumption is that the title to one of them was his absolutely, and the title to the other was in his wife, his children and himself. *The circumstance that the partnership pledged them does not offer a scintilla of legal evidence that the title was in the partnership.* There are instruments to which the title passes by delivery, such as notes and ordinary bonds for the payment of money. Possession of an instrument of this class is presumptive evidence of title, and the holder can recover in an action upon it by producing it upon the trial without further evidence of title. But a policy of insurance does not belong to this class of instruments, and because possession is not *prima facie* evidence of title, no recovery can be had by the holder upon it, when not payable to him, without proof of an assignment.

The agreement pledging the policies was not even moral evidence that they were owned by the partnership, because it appears that Jacob M. Mertens joined in it individually by a separate agreement executed contemporaneously, and endorsed upon its back'' (fols. 80-81) (italics ours).

III.

This court will not consider the question presented by the third assignment as to whether the sale of the policies was good and valid and passed a good and valid title to the defendant in error.

The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties are governed by the law of that State. No Federal question is involved.

Thompson *vs.* Fairbanks, 196 U. S., 516-522;
Humphrey *vs.* Tatman, 198 U. S., 91.

The plaintiff in error in his objections to the claim, did not allege any fraud on the part of the defendant in error in the sale or disposition of the policies, and failed to prove that any fraud was committed.

The policies were pledged nearly two and a half years prior to the filing of the petition in bankruptcy, and no question was raised as to the *bona fides* of the transactions in which the policies were pledged.

The policies were sold by the bank in accordance with the terms of the contracts under which they were pledged, and the fact that they were sold without notice to any one except the bank, and that the bank became the purchaser, does not in the absence of fraud, in any way invalidate the sale.

Baker *vs.* Drake, 66 N. Y., 518;
Williams *vs.* The United States Trust Co., 133 N. Y., 660;
Gillet *vs.* Bank of America, 160 N. Y., 549;
Toplitz *vs.* Bauer, 161 N. Y., 325;
Bailey *vs.* American Deposit Co., 52 App. Div., 402;
Palmer *vs.* Mut. Life Ins. Co. of N. Y., 38 Misc., 318;
Genet *vs.* Howland & Aspinwall, 45 Barb., 560;
Franklin Natl. Bank *vs.* Newcombe, 1 App. Div., 297; aff. 157th N. Y., 699;
Wheelwright *vs.* St. Louis, 56 Fed. Rep., 164;
Fidelity Ins. Trust and Safe Deposit Co. *vs.* Roanoke Iron Co., 81 Fed. Rep., 439.

The learned Circuit Court of Appeals for the Second Circuit in its opinion said:

> "The Court below regarded the sale made by the Bank as a fraudulent sale. *There was no evidence of fraud* unless the facts which have been referred to justify the inference of fraud. *We are at a loss to understand how fraudulent conduct can justly be imputed to a pledgee when it appears that whatever was done in executing the power of sale, was done in full compliance with the terms of the pledge, and when there is no evidence that any unconscionable advantage was taken of the pledgor or his creditors*" (fol. 83) (italics ours).

IV.

The contention of the plaintiff in error that the policies in question were not properly liquidated under the provisions of Sec. 57, subdivision H of the Bankrupt Act, is manifestly erroneous.

The section in question provides:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the Court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The plaintiff in error contends that this Subdivision be so construed that the words "as the Court may direct" shall relate to all methods provided for liquidation.

If this construction were to prevail, the Court would have a right to direct a liquidation of securities held by a creditor without regard to the contractual rights of the creditor conferred by the agreement under which the securities were pledged to him, and upon the faith of which he parted with his money.

In the case at bar, the defendant in error at the time of the presentation of its claim for allowance, had already liquidated its securities, and the result of the construction contended for by the plaintiff in error, would warrant the court in dis-

regarding what had been done in accordance with the terms of the contracts of pledge, and direct any other mode of liquidation that it might see fit to adopt.

It was never intended by Congress that the Court should have the right to prescribe a different mode of disposing of the pledge than the one agreed upon by the parties. The correctness of this contention is at once manifest when we analyze this subdivision. It provides:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement, pursuant to which such securities were delivered to such creditors."

If we stop at this point, there can be no doubt that a perfect and complete mode of disposing of the pledge is thus provided for, but Congress cognizant of the manner in which pledges of personal property are frequently made, that parties had not by express agreement provided for the disposal thereof, and contemplating the possibility of disputes as to how the pledge should be disposed of, or its value ascertained, provided that the creditor and the trustee may come together, and either by agreement, arbitration or compromise, arrive at the result desired, or if the agreement, arbitration or compromise is impossible then by liquidation.

The Court by this subdivision is only given the right to direct the disposition of the pledge, or the ascertainment of its value, if the parties have failed to do so by their own agreement, and then only as provided by the statute.

The phrase "as the Court may direct" has no grammatical or logical relation to the opening phrase: "the value of securities held by secured

creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors." It limits and applies to that which follows the preposition "or," *i. e.*, "by such creditors and the trustee, by agreement, arbitration, compromise or litigation." That this is the correct analysis is plain when the phrase "as the court may direct" is transposed as though it read as follows:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities are delivered to such creditors, or, as the Court may direct, by such creditors and the trustee by agreement, arbitration, compromise or litigation."

As was correctly stated by the learned Circuit Court of Appeals in its opinion:

> "By the former Act it was provided, that a secured creditor should be admitted as creditor only for the balance of his debt after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the Court. Under that provision, if a pledgee sold the pledged property prior to the appointment of the assignee, or without the permission of the Court, he was precluded from proving his claim or obtaining any share of the bankrupt's estate, to which he would have otherwise been entitled. The present act provides that the value of his security may be determined, among other methods, by converting it into money pursuant to his contract rights, and thus if he has enforced it, as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim. Section 57 Subdi-

vision H, prescribes several modes of valuation, *and the one referred to is exclusive of the others, and is superfluous and useless unless it is intended to authorize the creditor without interference by the trustee or the Court to value his own security provided he turns it into money 'according to the terms of the agreement pursuant to which it was delivered to him'* " (fol. 85) (italics ours).

V.

The fifth assignment of error requires no discussion, as it raises substantially the same question as the fourth.

VI.

The plaintiff in error as trustee, obtained no better title to, or greater rights in the property of the bankrupts than the bankrupts or their creditors had as of the date of the adjudication.

Hewit *vs.* Berlin Machine Works, 194 U. S., 296;
Thompson *vs.* Fairbanks, 196 U. S., 516;
Humphrey *vs.* Tatman, 198 U. S., 91;
York Mfg. Co. *vs.* Cassell, 201 U. S., 344-352.

The question raised by the sixth assignment of error is whether the sale of the policies by the defendant in error was *ipso facto* void, because held intermediate the date of the filing of the petition and the adjudication.

Under the Act of 1867, the title of the assignee in bankruptcy accrued as of the date of the filing of the petition in bankruptcy.

U. S. Revised Stat., §5044.

Under the Act of 1898, the title of the trustee accrues as of the date of the adjudication.

§70, Sub. Div. A.

Under the former act, it was long considered that a lien previously acquired, could not be enforced subsequent to the filing of the petition without permission of the Bankruptcy Court. This Court, however, refused to sanction that view.

Eyster *vs.* Gaff, 91 U. S., 521;
Jerome *vs.* McCarter, 94 U. S., 734.

The radical change in the present Act by which the trustee's title accrues as of the date of the adjudication, must have been intended by Congress to remove whatever uncertainty existed under the prior Act, and this Court has frequently taken occasion to call attention to the necessity of giving due importance to the change in the phraseology of the present Act as compared to the prior one.

Pirie *vs.* Chicago Title & Trust Co., 182 U. S., 438-448.
Bardes *vs.* Bank of Hawarden, 178 U. S., 524.

The House Committee on Judiciary in its report to the House, referring to § 70 of the Act of 1898, says:

"Under § 70, an important change has been made from the former laws as well as from proposed legislation. Under the Act of 1867 as interpreted by Congress, it was held that the title of the bankrupt's property vested in the assignee as of date of the filing of the petition in bankruptcy. This bill provides, that the trustee shall be vested by operation of law with the title of the bankrupt's property as of the date he was adjudged a bankrupt. By this change the alleged bankrupt can sell and convey a perfect title up to the date of the adjudication, and the purchaser does not buy at his own risk, and in default of having secured an imperfect title, by reason of the adjudication which may be made subsequent to the purchase. *It does not follow that because a petition is filed against a person in bankruptcy, he will be adjudged a bankrupt, and it seems proper that the public in dealing with him until he is adjudged a bankrupt, should deal without fear or loss of security as to title.*" Italics ours.

Jerome *vs.* McCarter, 94 U. S., 734, is absolutely controlling and decisive upon the right of the defendant in error to dispose of the collateral in accordance with the terms of the contracts under which it was pledged, upon default in the payment of the debt, whether before or after adjudication.

In that case, certain mortgage bonds had been pledged as collateral security for loans. Bankruptcy proceedings intervened and a Receiver was appointed. Subsequently the bonds were sold by the pledgee, and the contention was made that the pledgee could not dispose of the pledge after the adjudication in bankruptcy. The Court held:

"There is some proof that when the Company became bankrupt (August 28, 1872), some of the bonds were held as collaterals for loans made to the Company smaller in amount than the bonds pledged, but the bonds were

subsequently sold by the pledgees, and the present holders hold them by absolute right. *The position that the pledgees could not sell the pledge after the adjudication in bankruptcy, is quite untenable. It is sustained by nothing in the Bankrupt Act. The bonds were negotiable instruments. They passed by delivery, and even were there no express stipulation in the contracts of pledge that the pledgee might sell on default of the pledgor, such a right is presumable from the nature of the transaction. Certainly the bankrupt act has taken away no right from the pledgee secured to him by his contract"* (italics ours).

It further appeared in that case that some of the bonds were still held by the pledgee and the complainant sought to prevent the disposition thereof. The Court said:

"In regard to the bonds covered by the Mc-
"Carter mortgage, which is the one now in
"suit, we find no error in the decree of which
"the appellants can complain. Most of those
"bonds, though at first issued as collaterals
"for loans made to the mortgagor, have been
"sold and they are now owned by the pur-
"chasers. There are some it is true, that are
"still held in pledge, *but the pledgees have a*
"clear right to use them either by sale or by
"collection until the full amount of the debts
"due from the mortgagors is satisfied." (Italics ours.)

Bacon *vs.* International Bank of Chicago, 131 U. S., CCXVI;
Adams *vs.* Collier, 122 U. S., 382-390;
Avery *vs.* Hackley, 20 Wall., 407;
Clark *vs.* Iselin, 21 Wall., 360;
Sawyer *vs.* Turpin, 91 U. S., 114;
Yeatman *vs.* Savings Institution, 95 U. S., 764;
Stewart *vs.* Platt, 101 U. S., 731;

Fidelity Ins. Trust & Safe Deposit Co. *vs.* Roanoke Iron Co., 81 Fed. R., 439;
Wheelwright *vs.* St. Louis, 56 Fed. Rep., 164;
Hauselt *vs.* Harrison, 105 U. S., 401;
Cook *vs.* Tullis, 18 Wall., 332;
Gibson *vs.* Warden, 14 Wall., 244;
Laughlin *vs.* Calumet & Chicago Canal & Dock Co., 65 Fed. R., 441.

The gist of the complaint of the plaintiff in error, that the sale of these policies was void because held subsequent to the filing of the petition, is founded upon an expression of opinion of this Court in the decision of Mueller *vs.* Nugent, 184 U. S., 1-14. It was there said:

> "It is true of the present law as it was of that of 1867, that the filing of the petition is *caveat* to all the world, and in effect an attachment and injunction. *Bank* vs. *Sherman, 110 U. S., 403.*"

The doctrine of Mueller *v.* Nugent, and Bank *v.* Sherman has no application to the case at bar. As was said by this Court in its opinion in York Mfg. Co. *v.* Cassell, 201 U. S., p. 344-353:

> "The remark in Mueller *v.* Nugent, 184 U. S., 1, 'that the filing of the petition' (in bankruptcy) 'is a caveat to all the world and in effect an attachment and injunction,' was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt under such facts as are above stated. The dispute in the Mueller case was whether the Court in Bankruptcy had power to compel in a summary way the surrender of

money or property of the bankrupt in the possession of the bankrupt, or of some one for him without resorting to a suit for that purpose."

As was aptly said by the learned Circuit Court of Appeals in its opinion in this case:

"Under the former act, there were many decisions that a lien previously acquired could not be enforced subsequent to the commencement of the proceedings, except with the permission of the Bankruptcy Court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. Eyster *v.* Gaff, 91 U. S., 521; Jerome *v.* McCarter, 94 U. S., 734. The change in the present act by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the Act of 1867. It was intended we think, to permit all legitimate business transactions between the debtor and those dealing with him, to be carried out and consummated as freely until he has been adjudicated a bankrupt, as though no proceedings were pending. In many cases, the proceeding against an alleged bankrupt is unfounded, and for this and other reasons, never culminates in an adjudication. While the filing of the petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceedings. That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy, is indicated

by the change made in the present act with respect to the proofs of claims by secured creditors."

VII.

The filing of the verified proofs of debt established a prima facie case, and entitled the defendant in error to the allowance of its claims in the absence of any proof under the objections filed by the plaintiff in error.

The seventh assignment of error requires no discussion, as it is practically comprehended within those already discussed. The same is true of the ninth assignment of error.

The eighth and tenth will be considered together.

It will be recalled that at the hearing before the Referee, after the mutual concessions with regard to the manner of the disposition of the policies in question had been spread upon the record, the plaintiff in error was requested to state whether he rested. Receiving no response, a motion was then made to have the Referee decide that the burden of proof was upon the plaintiff in error.

This Court has recently held that bankruptcy proceedings are more summary than ordinary suits, and that a sworn proof of claim against a bankrupt is *prima facie* evidence of its allegations in case it is objected to.

Whitney *v.* Dresser, 200 U. S., 532.
In re Dresser, 135 Fed. Rep., 495.
In re Summer, 101 Fed. Rep., 224.
In re Doty, 5 Am. Bankruptcy Rep., 58-60.
In re Shaw, 109 Fed. Rep., 780;
In re Cannon, 133 Fed. Rep., 837-838.

The only evidence as to the value of the policies in question was the conceded fact that they realized $10,250 at the sale. Under the authority of Whitney *v.* Dresser, *supra*, it was incumbent upon the trustee, if he claimed inadequacy of consideration, to prove it. It was likewise incumbent upon him to prove that the sale was fraudulent, although, be it remembered, fraud was not alleged.

THE DEFENDANT IN ERROR SHOULD BE AWARDED SUCH REDRESS AS IT IS IN THE POWER OF THIS COURT TO GRANT, IN VIEW OF THE DELAY AND EXPENSE TO WHICH IT HAS BEEN EXPOSED.

The claims have been in litigation more than two years. The objections to the claims are wholly without merit. The questions presented are not involved by any diversity of opinion among the inferior federal courts, and indeed all have been decided by this Court adversely to the contention of the plaintiff in error.

It is obvious that the defendant in error can receive no compensation from the estate of the bankrupt for all its expenses and loss of interest.

It is respectfully submitted, therefore, that this is a proper case for the exercise of the power of this Court to award damages for delay. As was said in Whitney *vs.* Cooke, 99 U. S., 609:

> "Parties should not be subjected to the delay of proceedings for review in this Court without reasonable cause, and our power to make compensation for the loss occasioned by unwarranted delay, ought not to be overlooked."

All of which is respectfully submitted,

FREDERICK M. CZAKI,
Of Counsel.

FILE COPY.

Office Supreme Court, U. S.
FILED.
OCT 27 1906
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

244.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS, et al., Bankrupts,

Plaintiff-in-Error,

against

THE VARICK BANK OF NEW YORK,

Defendant-in-Error.

Brief in Reply.

FREDERICK M. CZAKI
Counsel for Defendant-in-Error.
11-19 William Street,
Manhattan, N. Y.

Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of Jacob M. Mertens *et al.*, bankrupts,
Appellant,

vs.

THE VARICK BANK OF NEW YORK,
Appellee.

Appellee's Brief in Reply, on Motion to Dismiss.

A.

A perusal of the appellant's brief and argument cannot fail to impress the Court with the fact that opposing counsel entirely misconceives the distinguishing characteristics between the corresponding provisions of the Acts of 1867 and 1898 relative to the vesting of the Trustee's title.

He attempts to impress this Court with the correctness of the proposition that under the Act of 1898, the title of the trustee *on* adjudication, vests *not as of the date of the adjudication, but as of the date of the filing of the petition.* (See p. 14 of Appellant's Brief.)

The Act of 1867 made no reference whatsoever to the date of the adjudication. It provided that as soon as an assignee was appointed and qualified, the judge or register by instrument, assigned and conveyed to the assignee all of the property of the bankrupt.

> "And such assignment *shall relate back to the commencement of the proceedings in bankruptcy,* and by operation of law vest the title to all such property and estate, both real and personal, in the assignee, etc."
>
> U. S. Rev. Stat., § 5044.

Section 70 of the act of 1898 provides,

> "The trustee of the estate of a bankrupt upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * to all * * * (5) property which prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

A comparison of these sections discloses that in the latter, there is omitted the provision that the trustee's title "shall relate back to the commencement of the proceedings in bankruptcy," *i. e.* the filing of the petition.

To sustain the appellant's contention would do violence to the language of the section, and obviously fail to give any weight to the omission of the phrase that such title "shall relate back to the commencement of the proceedings in bankruptcy."

As was said by this court in *Pirie vs. Chicago Title & Trust Co., 182 U. S., 438-448,*

> "Was this omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition.

> Was it left out in words to be put back by construction, taken from the certainty given by prior use and prior decisions, and committed to doubt and controversy? There is presumption against it. When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose. This rule we lately applied in Bardes *v.* First National Bank of Hawarden, 178 U. S., 524."

In effect, appellant's contention seems to be that Sub-division 5 of § 70a operates as enlarging the provisions of paragraph A and vesting the title of the trustee as of the date of the filing of petition.

Clause Five of Paragraph A of this section, as well as the others numerically designated, simply specifies the *character* of the property to which the title of the trustee shall vest, but in no sense operates as to *when* it shall vest.

Sub-division E of the same section wholly negatives the appellant's contention by providing that the trustee may avoid any transfer which any creditor might have avoided, unless the transferee was a bona fide holder for value *prior to the date of the adjudication,* thus clearly manifesting Congress's intention that up to the date of adjudication, the bankrupt could convey wholly or conditionally, any of his property, so long as it was not in fraud of creditors.

Hewett vs. Berlin Machine Co., 194 U. S., 296-302.

B.

The appellant contends that the facts stipulated were ample justification for, and require the findings made by the Referee and the District Court to the effect that the sale of the policies was in

fact no sale whatever, and that this court will protect the pledgor from the strict fulfillment of the contracts of pledge in question, because they were unconscionable in their terms.

We are yet to hear any claim, substantiated by any fact disclosed by the record, that the sale of these policies *was not* in strict compliance with the terms of the agreements of pledge. The contracts gave the appellee the right to sell at public sale, without demand, advertisement, or notice to anyone, and to become the purchaser at any such sale freed of the equity of redemption of the pledgor. This is precisely what was done.

The appellant's criticism of the cases cited under the third point, on p. 13 of the main brief, is not justified. The decisions of this State, and in fact of all of the States are uniform that the parties to a pledge may provide therein for any method of disposing of the pledge, which is not in contravention of a statute, against public policy or fraudulent.

The form of contract in question has been before the highest Court of the State of New York many times. In *Gilette* v. *The Bank of America, 160 N. Y., 549,* it will be found that the contract is almost identical to the one at bar.

A similar contract was in question in *Fidelity Insurance Trust & Safe Deposit Co.* v. *Roanoke Iron Co, 81 Fed. Rep., 439-449.*

Our opponent further criticises these cases in the respect that not in a single instance does it appear that the pledgor himself became the purchaser, except in *Franklin National Bank* v. *Newcomb.* In this he is mistaken.

In Fidelity Ins. *v.* Roanoke (*supra*) it appeared that Gwiner held twelve bonds of the Roanoke Iron Co. of $1000 each as collateral security for a note. Thereafter the note became due, and not

having been paid, Gwiner had the collateral sold at the stock call of the Pittsburgh Stock and Oil Exchange, at which sale they were bought by Gwiner. No notice of the sale was given. The Court held:

> "The contention of the counsel for exceptants is that Gwiner being the pledgee of these bonds as collateral security for the payment of the note of $5000 executed to him by the Roancke Iron Co., could not become the purchaser thereof at a sale of the same. It is undoubtedly true that where a pledgee without authority, sells negotiable collateral paper, he cannot become the purchaser. (Colebrooke Coll. § 126.) *But this doctrine does not apply in a case like this, where the pledgee is given full power and authority on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor any notice, or making any demand for payment.*"

He further criticises the cases cited in that it fails to appear in any, that the pledgee became the purchaser at a sale without notice.

Without burdening the Court with a critical examination of the cases cited, it is quite immaterial whether the fact appears or not. The Court of Appeals of the State of New York has repeatedly adjudicated that a contract of pledge, such as is in question, is valid and enforcible between the parties, and so long as the terms of the contract are strictly complied with, it is idle to argue that the sale is fraudulent, or the contract an unconscionable one.

C.

There is no merit in the contention that the Court below erred in allowing the claims rather

than reversing the action of the Referee and the District Court, and granting the trustee an opportunity to be heard. The matter of Livingston is not in point.

The appellant had his day in Court, but did not see fit to avail himself of the opportunity to substantiate his objections.

The record discloses that the matter was disposed of as upon an agreed state of facts. Both parties in effect moved for a direction.

At the conclusion of the hearing before the master, the following occurred which the appellant fails to call the Court's attention to:

> "*Mr. Czaki.*—I ask the Court to allow the claims of the Varick Bank of New York as filed upon the record and documents in evidence.
>
> *Mr. Crowley.*—I move for the disallowance of both of the claims, on the ground that the claims have not been properly proved; that the value of the securities set forth in the claims, has not been proved, and no evidence from which that value can be ascertained and found by the court has been given so as to establish the balance.
>
> *Mr. Czaki.*—The attorney for the creditors request to know of the attorney for the trustee whether he rests his case under the objections as filed?
>
> *Mr. Czaki.*—I move that the Referee decide that the burden of proof in the proceedings is upon the trustee not having received any response to my question as to whether he had rested."

Counsel for the appellant unintentionally errs when he states:

> "At this hearing, the claimant Bank, offered in evidence his proofs of claim, and submitted sixteen stipulations of fact, all being done by the claimant voluntarily without any contention that the burden of proceeding in

the first instance was upon the trustee" (p. 5, Appellant's brief).

The record discloses that the stipulations of fact were mutual concessions, which in no way affected the question of the burden of proceeding.

If these stipulations are to be considered *wholly* as the evidence of the appellee, there can be no possible doubt that the burden of proceeding at once shifted to the appellant to sustain his objections.

If on the other hand they be considered as *mutual,* it leaves the question of the burden of proceeding where it had been and as though no concessions had been made.

Again, if they be considered as evidence in substantiation of the appellant's objections, the conclusion is inevitable that they lamentably fail in so doing, and that the Referee erred in directing judgment in favor of the appellant by disallowing the claims.

In the Matter of Livingston, 144 Fed. Rep., 97, the trustee offered no proof whatever, but at the close of the claimant's *prima facie* case who voluntarily assumed the burden of proceeding, moved that the claim be disallowed. The motion was granted, and the claim disallowed. This upon appeal was reversed, and the claim allowed as filed, thus clearly depriving the trustee of any opportunity to introduce evidence; quite a different situation than in the case at bar where the trustee had his day in Court, was requested to proceed under his objections, and refused to do so.

D.

A perusal of the record of the proceedings before the Referee, his opinion, that of the District Court and of the Court below, discloses that at

no time was any question made with reference to the special deposit of $6000 to the personal account of Jacob M. Mertens, and which was held by the appellee as additional security for the payment of its indebtedness.

The appellant has failed to file any assignment of error predicated upon the appellee's failure to credit this amount upon the partnership debt. It is now raised for the first time, and hence cannot be considered.

Stevenson *v.* Barbour, 140 U. S., 48;
Rowe *v.* Phelps, 152 U. S., 87.

The record does not contain a particle of evidence substantiating the appellant's contention with regard to this special deposit; hence, there is no such plain error that this court will take notice of, even though not assigned.

United States *v.* Peana, 175 U. S., 500.

The motion should be granted.

Respectfully submitted,
FREDERICK M. CZAKI,
Of Counsel.

Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in bankruptcy of Jacob M. Mertens, *et al.*,
Appellant,

against

THE VARICK BANK OF NEW YORK,
Appellee.

This is an appeal under Section 25 B, Subdivision I of the Act of Congress relating to bankruptcy from an order of the United States Circuit Court of Appeals for the Second Circuit, reversing the decree of the United States District Court of the United States for the Northern District of New York, which in turn affirmed an order of a Referee in bankruptcy in that District, disallowing two claims of the Varick Bank of New York, one filed against the copartnership estate of J. M. Mertens & Company, and the other against the individual estate of a partner, Jacob M. Mertens.

Statement.

The facts as found by the court below and as established by the Record, and which under Gen-

eral Orders in Bankruptcy XXXVI are conclusive on this appeal are substantially as follows:—

On and prior to August 18th, 1903, Jacob M. Mertens, Charles M. Mertens, Ernest T. Mertens and Edmund A. Mertens were copartners engaged in manufacturing clothing under the firm name of J. M. Mertens & Co. Jacob M. Mertens was the father of the other copartners. On that day, an involuntary petition in bankruptcy was filed against the copartnership and the individual members composing it. On September 15th following, they were adjudicated bankrupts as individuals and copartners, and thereafter and on October 14th following, the appellant was elected the trustee of both the copartnership and individual estates (fol. 89, p. 48).

On the day that the petition in bankruptcy was filed, the copartnership was indebted to the Appellee, the Varick Bank of New York, in the sum of $27,893.85. This was predicated upon promissory notes and bills receivable made by the copartnership and Jacob M. Mertens, discounted by the Bank, and notes of third persons endorsed by the firm or by Jacob M. Mertens individually, or both, and discounted by the bank for the firm.

Among the obligations upon which the copartnership was liable, were five collateral notes, four for the sum of Five thousand dollars each, and one for Twenty-five hundred dollars, a total of Twenty-two thousand five hundred dollars. All were made and endorsed by the copartnership. The twenty-five hundred dollar note was signed by Jacob M. Mertens, individually, as a joint maker, and he likewise endorsed and guaranteed the payment of all the collateral notes. Jennie Mertens, his wife, also guaranteed the payment of the note of Twenty-five hundred Dollars. These five collateral notes were all of the same form as the one set out in the record (fol. 90, p. 48).

On the day the petition was filed Mertens individually was indebted to the bank in the sum of Twenty-five thousand four hundred and eighty-nine and 62/100 Dollars ($25,489.62). This indebtedness was predicated upon his endorsement and guaranty of the five collateral notes before mentioned, on one of which he was also a maker, the balance of the indebtedness being based upon his endorsement of sundry notes of third parties discounted by the bank for the copartnership.

Mertens individually, to secure the payment of his debt, and that due by the copartnership, pledged to the bank two policies of insurance upon his life, one for Fifty thousand Dollars ($50,000), No. 417,171 (Ex. G, pp. 51-52-53); the other for Ten thousand Dollars ($10,000) No. 252,314 (Ex. H, pp. 53-54-55).

The Fifty thousand dollar policy is known as a free Tontine policy, was issued on February 15th, 1889, payable to Mertens or his estate, the yearly premium $1,735, and the Tontine dividend period expires on the 15th day of February, 1909 (Ex. G, pp. 50-53).

The ten thousand dollar policy was issued on December 21st, 1882, payable to Jennie Mertens, wife of the insured, but in the event of her prior death to the children of the insured, the annual premium is $272.50. It was known as a Tontine Savings Bank policy. The Tontine dividend period expired on the 21st day of December, 1902, at which time under the terms of the policy, Mertens, as the insured, withdrew in cash the share of the accumulated surplus apportioned by the Society to the policy, and continued it in force on the ordinary plan (Ex. H, pp. 53-55).

On the 16th of March, 1901, Jennie Mertens, and the children of Jacob and Jennie, executed

an assignment of the $10,000 policy to the bank (Ex. I, p. 64). On March 25th, 1901, Jacob M. Mertens joined with his wife in executing a further assignment of the same policy to the bank (Ex. F, p. 64). On March 21st, 1901, Mertens, individually executed an assignment of the $50,000 policy to the bank (Ex. E, p. 64).

These assignments transferred all of the interest of the insured and the beneficiaries in the policies for the payment of the debts due or to be created by the partnership with the bank, giving it the right to surrender them on default in the payment of the debts.

In addition, the policies were pledged to the bank under the terms of the collateral notes and agreements of pledge. They provided substantially, that for value received, and stated, *the makers and endorsers* jointly and severally promised to pay to the bank or order, the sum stated as well as the payment of any liability or liabilities due from the *makers and endorsers* to the bank, then due or thereafter to become due, whether then existing, or thereafter arising.

The notes also contained the provision that the bank shall have a lien, for the amount of all the liabilities of the *makers and endorsers* to it, upon the property or securities given or left in its possession by them, and that upon the non-performance of the contract, or default in the payment of any of the liabilities due,

> "then, and in either such case, this note shall forthwith become due and payable, without demand or notice, and full power and authority are hereby given to said holder to sell, assign and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the under-

signed, for safe keeping or otherwise, at any broker's board or at public or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released, etc." (fols. 90-91, p. 49).

Endorsed upon the back of each of the collateral notes, and signed by Jacob M. Mertens, appears the following:

"In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y., its successors, endorsers or assigns, the punctual payment, at maturity of the said loan, and hereby assent to all the terms and conditions of the said note, and consent that the securities for said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender or extension" (fol. 91, p. 49).

On the day that the petition was filed, the bank held obligations which had matured and remained unpaid, aggregating $1,691.93.

On the day that the order of adjudication was entered, the bank held obligations matured and unpaid, aggregating $13,530.47. In this amount was included two of the collateral notes of $5000 each, and about $2000 of the notes of third persons likewise endorsed.

On September 10th, 1904, the bank filed against

the copartnership estate, an unsecured claim for the sum of $27,893.85, and on the same day filed against the individual estate of Jacob M. Mertens, a secured claim for the sum of $25,489.62 (p. 55).

At the time these claims were filed, the referee caused their allowance to be deferred until a meeting of the creditors should be held. In the interim and on November 14th, 1904, the Appellant filed objections to their allowance (p. 63), alleging in substance and effect that the sale of said policies was illegal; that the value of the securities held by the Bank had not been ascertained as required by the bankruptcy act, and that the policies were still held by it as collateral to said indebtedness, the Appellant still owning the equity (p. 63).

On December 1st, 1904, amended proofs of claim were filed, and the objections filed to the original proofs of claim were allowed to stand as objections to the amended proofs.

The amended claim against the copartnership, after reciting in detail each individual obligation upon which it was founded, crediting an off-set of $173.21 held by the bank on general deposit to the credit of the copartnership, and rebating the interest subsequent to the date of the filing of the petition, alleged: that at the time of the filing of the petition, the Bank held as security "WHICH WAS DEPOSITED BY JACOB M. MERTENS INDIVIDUALLY," property particularly described (p. 59).

The claim against Mertens individually, also sets out in detail each obligation held by the Bank at the time of the filing of the petition, that it was secured by the individual deposit of Mertens for the sum of $6,000, and the two policies of insurance mentioned, and then alleges:

> "That under and by virtue of the terms of the agreement under which the said policies

were deposited as collateral with the said bank, the said bank was authorized and empowered by the said bankrupt upon default in the payment of the said debt or any part thereof to sell, assign or otherwise dispose of the said collateral security at public or private sale with or without notice to the said bankrupt, as is more particularly specified in the said agreement. That in accordance with the said agreement as aforesaid, the said Varick Bank of New York did, prior to the date of the adjudication herein and subsequent to the date of the filing of the petition, convert the said policies into money in accordance with the terms of the agreement under which the same were deposited, realizing therefor the sum of $10,221, leaving due and owing to said Varick Bank of New York, the sum of $9,118.37, etc." (p. 62).

The hearing on the claims and objections having come on before the referee, the following facts were *mutually conceded*:

1. That prior to or on the 14th day of September, 1903, the Bank gave to its attorneys, the two policies in question.

2. That prior to or on the said date, the policies were handed by the Bank's attorneys to a duly licensed auctioneer, with instructions to sell the same at public auction at *the New York Sales Rooms in the City of New York, Borough of Manhattan.*

3. That no notice of said sale was given to any one except the Bank.

4. *That on said 14th day of September, 1903, at 2 p. m. thereof, the said policies were offered for sale at said New York Real Estate Sales Rooms to*

the highest bidder by said auctioneer. That only one bid was made by one of the attorneys for the Bank in the name of Herbert M. Delanoie, who was not present, for the sum of $10,250. *That said policies were sold separately, the $5,000 policy for $7,000, the $10,000 policy for $3,250.*

5. That the Bank prior to said sale, had instructed its attorneys that *should* they purchase the policies, to do so in the name of Delanoie.

6. That prior to the sale, the bank drew its check on the Western National Bank to its own order for the sum of $10,279, which the cashier of the Bank cashed in bills, and handed to its attorneys.

7. That after the sale, its attorneys gave said money to the auctioneer, and that the auctioneer's fees were $29.

8. That after the sale, the auctioneer gave the bank's attorneys his certified check for $10,250, to the order of the Bank, which check was delivered to the Bank by its attorneys.

9. That after the sale, the bank and the auctioneer severally executed bills of sale for each of the policies in question, transferring to Delanoie, all the right, title, and interest of Jacob M. Mertens, and the bank in the policies.

10. That the policies were purchased by the Bank at said sale, and that whatever title was acquired by Delanoie, was taken for the bank, and he, said Delanoie, still holds the policies for the bank, subject only to the rights of the Knickerbocker Trust Co., to the extent of a loan of $10,250, which the Knickerbocker Trust Co. made on these poli-

cies to Delanoie, and which amount Delanoie delivered to the Bank, and subject to a further loan of $2,622.75, since loaned thereon with interest.

11. That on August 19th, 1903, the day after the filing of the involuntary petition in bankruptcy, the bank had actual notice that a Receiver had been appointed of both the firm and the individual estates (pp. 63, 64).

Thereupon the following colloquy occurred:

> "*Mr. Czaki.*—I ask the Court to allow the claims of the Varick Bank of New York as filed upon the records and documents in evidence.
>
> *Mr. Crowly.*—I move for the disallowance of both of the claims on the ground that the claims have not been properly proved, or the value of the securities set forth in the claims has not been proved, and no evidence from which that value can be ascertained and found by the Court has been given so as to establish the balance.
>
> *Mr. Czaki.*—The attorney for the creditors requests to know of the attorney for the trustee whether he rests his case under the objections as filed.
>
> *Mr. Czaki.*—I move that the referee decide that the burden of proof in the proceeding is upon the trustee, not having received any response to my question as to whether he had rested" (p. 65).

Thereupon the Referee in an oral decision, disallowed both claims as filed, stating, however, that the bank might, if it so wished, *offer further evidence, with a view of establishing the value of the policies* (p. 65).

The Appellant then made a motion that the Court direct a method by which the security be liquidated and that in so doing the bank *resell the policies upon notice to the trustee.* Objection being made to this motion, the Referee reserved decision (p. 66).

The Bank then filed its petition in the District Court to review the Referee's action.

Thereupon the Referee granted the appellant's motion and directed that the bank make public sale of the policies upon notice to the trustee, and all the parties interested, including the insurance Company (p. 66).

The review of the Referee's decision resulted in an affirmance of his orders disallowing the claims and directing a resale of the policies (p. 66).

134 Fed. Rep., 101.

An order of affirmance was subsequently entered. From that order, the Bank appealed to the Circuit Court of Appeals for the Second Circuit and a decision was rendered in all respects reversing the order of the District Court and directing the allowance of the claims as filed.

144 Fed. Rep., 818.

The Circuit Court of Appeals thereupon made findings of fact as above detailed, and found as conclusions:

1. That the order of the Referee and the District Court was a rejection of the claims.

2. That the policies did not belong to the partnership estate, and that the claim against the partnership should have been allowed in full.

3. That the sale of the policies under the facts as stipulated, was good and valid and passed a good and valid title to the bank.

4. That the value of the policies was properly liquidated by said sale under the terms of Section 57 H of the Bankruptcy Act, and that under said section the Referee had no power to make the order directing a resale thereof.

5. That the Bankruptcy Act did not suspend or enjoin the exercise of the power of sale during the time between the filing of the petition and the adjudication.

6. That the said claim against the individual estate of Mertens should have been allowed in full.

7. That the burden of proving that said sale was unfair was upon the trustee (p. 66).

Thereupon an order of reversal was entered, and a mandate issued from which an appeal was taken to this court by the appellant.

Subsequently the bank made a motion under Rule 6 that the appeal be dismissed, or, in the alternative, that the decree appealed from be affirmed, upon the ground that the appeal was taken for delay only. Decision upon this motion was reserved until a hearing upon the merits.

POINTS.

I.

The order of the District Court affirming the decision of the Referee was a final disallowance and rejection of the claims of the bank.

The Referee in his opinion disallowing the claims said:

> "As the proof now stands, I shall, therefore, *decline to allow* either claim as established against the estate or estates" (p. 65).

The recital in the opinion of the District Judge states:

> "Objections having been filed by the trustee to the allowance of each claim, mainly on the ground that the value of such collateral had not been properly ascertained or credited; that the value of the policies has not been ascertained as provided by Subdivision H. Section 57 of the Bankrupt Act, *the Referee disallowed both claims as matters stand, and made an order prescribing the method for ascertaining the value of such policies.*" (Italics ours.)
>
> 134 Fed. Rep., 102.

The conclusion of the learned District Judge is thus stated in his opinion:

> "The orders of the Referee *disallowing* the claims are approved and affirmed."
>
> 134 Fed. Rep., 105.

The order entered upon the opinion of the District Judge provides:

> "Ordered, that the ruling of the said Referee rendered herein on the 2nd day of December, 1904, be and the same hereby is, in all respects and things, approved and affirmed." (Fol. 51, p. 27.)

The decision of the Referee that the sale of the policies was not a valid exercise of the power conferred, that the Bank still held them as security, as though no sale had been had, and directing that they be resold, was in fact a total disallowance and rejection of the claims as filed.

In disposing of this point, the Circuit Court of Appeals said:

> "We entertain no doubt that the order appealed from was in substance and effect a rejectment of the claims such as to authorize an appeal pursuant to Section 25 of the Bankrupt Act, as well as a review pursuant to Section 24. The bank insisted that its claims were for a definite amount, the amount stated in its proofs of debt less the sum which it had already derived from the sale of the securities. *The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction.*" (Italics ours.)
>
> 144 Fed Rep., 819.

II.

The decree of the Circuit Court of Appeals directing the District Court to allow the Bank's claim against the partnership in full is not erroneous.

A.

The Bank was not a secured creditor within the meaning of the term "secured creditor" as defined by the Bankrupt Act.

Judge Ray, referring to the Bank's contention, that the policies were the property of Mertens, and not the copartnership, and hence that its claim was not "secured," said:

> "The trouble with this contention is, the amended claim does not so show or state, and in one of the notes at least, the policies are pledged in writing by the firm as well as by J. M. Mertens as owner. As such policies were assignable, this Court will not assume they were owned solely by J. M. Mertens individually.
>
> 134 Fed. Rep., 102.

The learned District Judge obviously erred. He overlooked the fact that the amended proof of debt against the partnership distinctly states:

> "That at the time of the filing of said petition, the Varick Bank of New York held as collateral security for the payment on said debt, *which said collateral was deposited by J. M. Mertens individually, the following described property, to wit*: * * * a certain policy of insurance upon the life of J. M. Mertens in the Equitable Life Assurance Society of the United States, No. 417171, for

> the sum of $50,000, and a certain other insurance policy upon the life of J. M. Mertens in the said Equitable Life Assurance Society of the United States, No. 252314, for the sum of $10,000" (p. 59).

The appellant, in his objections to this claim, admitted that the collateral held by the Bank was pledged to it by Mertens individually:

> "Said claim (partnership debt) is further objected to on the ground that certain payments have been credited thereon by J. M. Mertens, individually, *and certain credits should have been made thereon on account of collaterals furnished to said bank by J. M. Mertens for the payment thereof, etc.*" (fol. 29, p. 16).

Furthermore, it was conceded by the Appellant, that these policies were assigned and pledged to the Bank by Mertens individually, and the members of his family, *and not by the copartnership* (Exhibits E, F, I, 12th and 16th Concession, fols. 113, 114, p. 64).

The original proof against the individual estate also alleged:

> "That at the time of the filing of the petition in bankruptcy, said Varick Bank of New York held as collateral security *property of said bankrupt* (*J. M. Mertens*), which property according to the terms of the agreement, etc." (fol. 5, p. 3).

Judge Ray in his opinion states, that it does not appear, and the Court would not assume that the firm did not own at least an interest in the policies, when, upon the face of one of the notes, it appeared that the Company pledged them as security for one of the notes in question.

That the policies were pledged to secure the copartnership debt, is no evidence of the fact, assumed by the District Judge, that the copartnership had any interest in, or title to the policies.

The fact that Mertens individually was the owner of these policies, and that he, and not the copartnership, pledged them with the bank for the payment of its debt, *was never disputed, in fact conceded, and cannot now be questioned.* The objection to the claims presented no such issue. The appellant's position was that the bank was obliged to apply the avails of the policies in payment and reduction of its claim against the copartnership.

Sub-Division 23, of Section 1 of the Act defining the term "secured creditors," provides:

> " 'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some endorser, surety, or other person secondarily liable for the bankrupt, has such security upon the bankrupt's assets."

That "secured creditor" has a limited meaning in bankruptcy must always be remembered. In effect, no creditor is secured in bankruptcy unless there is a lien held by him, or accruing to his benefit, *upon the property of the bankrupt.*

The copartnership estate is entirely distinct from that of the individual. The assets must be separately administered, and can in no way be so commingled as to deprive a creditor holding security upon the individual estate of a partner from proving the full amount of his debt against the copartnership estate, irrespective as to whether he has or not filed a claim against the individual estate.

In re Noyes Bros., 127 Fed. Rep., 286;
Gorman *vs.* Wright, 136 Fed. Rep., 164;
Swarts *vs.* Fourth Natl. Bank of St. Louis, 117 Fed. Rep., p. 1;
In re Swift, 106 Fed. Rep., 65;
In re Heyman, 95 Fed. Rep., 800;
In re Bingham, 94 Fed. Rep., 796;
In re Headley, 97 Fed. Rep., 765-771;
In re Coe, Powers Co., 1 Am. Br. Rep., 275;
Collier on Bankruptcy, 3rd Ed., p. 321;
Madison Sp. Bank *vs.* Pierce, 137 N. Y., 444.

Section 20 of the Act of 1867, in this respect, is identical with Sub-Div. H of Section 57. It provides in part,

> "When a creditor has a mortgage or pledge of real or personal property *of the bankrupt, or a lien thereon,* for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the Court shall direct." (Italics ours.)

Under that act, it was uniformly held that a creditor was not secured unless he held, as collateral, property of the bankrupt, or the endorsement of an accommodation maker or endorser who held security upon the property of the bankrupt.

In re Anderson, 7 Biss., 233;
In re Cram, 1 Hask., 89;
In re Howard Cole & Co., 4 Natl. Bank Register, 185, S. C. Fed. Cases, 6750;
In re Thomas & Sivyer, 8 Biss., 139;
In re Whiting, 2 Lowell, 472;
In re Foot, 8 Ben, 228;
In re Ellerhorst, 8 Fed. Cases, 522-523; S. C., 5 Natl. Bankrupt Ct. Reg., 144;
Ex parte Talcott, 2 Lowell, 320;
In re Hollister, 2 Dill., 136;
Downing *vs.* The Bank, 7 Fed. Cases, 1008-1011;
In re Dunkerson, 4 Biss., 253;
Jervis *v.* Smith, 3 Bank Reg., 147;
In re Babcock, 3 Story, 393;
In re Plummer, 1 Phillips, 56;
Wilder *vs.* Keeler, 3 Paige, N. Y. Ch. 167;

The Appellant's counsel attempts to escape the uniform trend of authority on this subject, by saying that these cases are not applicable, because, by the agreements contained in the notes, the bank *must* apply upon the partnership debt, the avails of these policies. In this connection, he concedes that the guaranty of endorsement, signed by Mertens, by its terms makes all the provisions of the notes part of the guaranty itself. (Appellant's Brief on Motion to dismiss, pp. 16, 17.) Therefore, the fact that Mertens joined as maker in one note only, is immaterial.

It is too well settled to require citation of authority that the liability of the copartnership and Mertens on these obligations, is not joint, but joint and several; and that irrespective of the rule in

bankruptcy, the bank had a right to apply the collateral in payment of either the debt of the copartnership, or the individual. At the time of the filing of the petition, having made no application of the securities, it exercised the right, recognized by the settled rule in equity, and of courts of bankruptcy, to apply the proceeds thereof in exoneration of the individual debt.

Bearing in mind the conceded proposition that Mertens was, in legal effect, a maker on all of these notes by virtue of the guaranty of endorsements, reference to the terms of the notes will at once manifest the obvious error which Appellant's counsel commits.

The notes provide that in case of a sale, the holder *may* apply the residue of the proceeds "to pay one, or more, or all of the liabilities due it, *as to it shall seem proper,* whether then due or not, returning the overplus, if any, to the undersigned, who agree to be and remain liable for any deficiency" (p. 49).

Thus, instead of making it obligatory upon the bank to credit the avails upon the partnership debt as contended, *by express terms, it is given the right to apply the security "in any manner as to it shall seem proper."* In other words, the bank is given the absolute power and option to apply the security to the extinguishment of *any* particular obligation, or *any* liability whether of the makers or endorsers.

Judge Wallace in the opinion of the Court below, disposing of the copartnership claim, in part states:

> "The propriety of the disallowance of the claim against the partnership estate depends upon considerations which are peculiar to that claim and have no bearing upon the claim against the individual estate of Jacob

M. Mertens. If the securities were not the property of the partnership when they were pledged to the bank as collateral for the payment of the indebtedness, the bank was entitled to have its claim against the partnership allowed, and allowed at its face without any deduction. If they were not part of the partnership assets, they were not part of the joint estate in bankruptcy, and as to that estate the bank was under no obligation to apply or realize their value in reduction of its claim. If they were the property of Jacob M. Mertens individually, and were pledged by him, the bank would have been at liberty upon selling them to apply the proceeds to the payment of his individual debt; and, no application having been made at the time, the settled rule of equity and of the courts of bankruptcy required the application of the proceeds in exoneration of the individual estate. * * *

"There was no evidence tending to show that the policies belonged to the partnership, except the circumstance that on one occasion the partnership made an agreement pledging them to the bank for the payment of a partnership note and all other liabilities to the bank which might thereafter arise. As the policies insured the life of Jacob M. Mertens, and were payable, one to him or his legal representatives, and the other to his wife or surviving children and to him in the event of their death before his, the legitimate presumption is that the title to one of them was his absolutely, and the title to the other was in his wife, his children, and himself. *The circumstance that the partnership pledged them does not afford a scintilla of legal evidence that the title was in the partnership.* There are instruments to which the title passes by delivery, such as notes and ordinary bonds for the payment of money. Possession of an instrument of this class is presumptive evidence of title, and the holder can recover in an action upon it by produc-

ing it upon the trial, without further evidence of title. But a policy of insurance does not belong to this class of instruments, and, because possession is not *prima facie* evidence of title, no recovery can be had by the holder upon it, when not payable to him, without proof of an assignment. *The agreement pledging the policies was not even moral evidence that they were owned by the partnership, because it appears that Jacob M. Mertens joined in it individually by a separate agreement executed contemporaneously and endorsed upon its back.*

"We conclude that the claim against the partnership estate should have been allowed in full." (Italics ours.)

144 Fed. Rep., 819.

B.

The filing of the verified proof of debt established the appellee's prima facie case, and entitled it, in the absence of proof under the objections, to the allowance of the claim.

Section 57, Sub. Div. G, Act of 1898.
Whitney v. Dresser, 200 U. S., 532.

Judge Ray recently held, in *Re Castle Braid Company*, 145 Fed. Rep., 224-228, following the decision just cited:

"It is settled in Whitney *vs. Dresser* * * * in substance, *that the allegation of the proof of claim are to be taken as true.* If they set forth all the necessary facts to establish a claim, and are not self contradictory, *prima facie*, they establish the claim, even in the presence of objections, and the objector is then called upon to produce evidence and show facts tending to defeat the claim of probative force equal to that of the allegations of the proofs of claim.

The burden of proof is always on the claimant, but, as probative force is given to the allegations of the proofs of claim, and no probative force is given to the objections, this must be met, overcome, or at least equalized by the objecting party. *In short, if the proofs of claim state facts sufficient to make a prima facie case, and it is stated that there is no security, the referee is bound to allow the claim, unless evidence controverting such facts is given by the objecting party, etc.*" (Italics ours.)

See also:

Matter of Dresser, 135 Fed. Rep., 495;
In re Carter, 138 Fed. Rep., 846;
In re Cannon, 133 Fed. Rep., 837;
Matter of Shaw, 109 Fed. Rep., 782;
In re Doty, 5 Am. Bank. Rep., 58;
In re Sumner, 101 Fed. Rep., 224.

C.

No assignment of error has been filed as to the $6,000 deposit.

The Appellant will claim that the bank failed to show any right by which it applied this $6,000, except the last clause of the collateral notes, which made it obligatory upon the bank to apply this money in payment and extinguishment of the debt of the copartnership.

A perusal of the record discloses that at no stage of the proceedings, did the Appellant raise any question with reference to this money. He has failed to file any assignment of error predicated upon the bank's failure to credit this amount upon the partnership debt. It is now raised for the first time, and hence cannot be considered.

Stevenson *vs.* Barbour, 140 U. S., 48;
Rowe *vs.* Phelps, 152 U. S., 87.

Nor does the record contain the slightest suggestion substantiating the appellant's contention in this respect. Hence there is no such manifest error that this court will take notice of, even though not assigned.

U. S. *vs.* Pena, 175 U. S., 500.

Assuming, but not conceding, that the question is open for consideration, the Appellant's claim is fully answered by the statement contained in the partnership proof of debt to the effect that at the time of filing of the petition the bank held as collateral security for the payment of the debt, *which said collateral was deposited by Mertens individually,* the following described property, to wit:

> "The sum of $6,000 held on deposit with the Varick Bank of New York for the *individual* account of Jacob M. Mertens" (p. 59).

What has been said under sub-divisions A and B of this point, applies here as well.

In any event, the bank had the right to apply this deposit to the payment of the individual debt, irrespective of any agreement or right by which it was held as collateral security.

N. Y. County Bank *vs.* Massey, 192 U. S., 138;
Moch *vs.* Market St. Natl. Bank, 107 Fed. Rep., 897;
Frank *vs.* Mercantile Natl. Bank, 182 N. Y., 264;
In re Philip Semmer Glass Co., 135 Fed. Rep., 77; appeal dismissed.
See Conboy *vs.* First Nat. Bk. Jersey City, 203 U. S., 141.

D.

The doctrine of the application of payments does not apply in any sense to the partnership claim.

The Appellant in his brief under Point IV advances the argument that the partnership claim should not have been allowed, for the reason that the Bank failed to apply the $6,000 held as security on deposit to the individual credit of Mertens, and the avails of the policies. This sum, and the proceeds of the policies, he says, should have been applied in payment of the obligations held by the bank *in the order as they fell due.*

The obvious fallacy of this contention is at once manifest when attention is called to the fact that, by virtue of the terms of the collateral notes, default in the payment of any obligation held by the Bank *ipso facto* matured the entire debt. The notes provide:

> "On the non-performance of this promise, *or upon the non-payment of any of the liabilities above mentioned* * * * this note shall forthwith become due and payable."

The "liabilities above mentioned" are any and all liabilities due by the makers and endorsers to the bank, hence as the fact is, that the bank held obligations which had matured and remained unpaid before the petition in bankruptcy was filed, the bank's entire debt, by virtue of the terms of the collateral notes, became at once due and payable.

Furthermore, the Appellant fails to appreciate that by virtue of the provisions of the bankrupt act, the filing of the petition followed by the adjudication, matures all obligations held by a creditor, making them provable, whether due at the time of the filing of the petition or not.

In other words, the bankrupt act makes all the debts of the bankrupt due as of the date of bankruptcy.

Sec. 1, Sub. Div. 11, Bankrupt Act 1898;
In re Phillip Semmer Glass Co., 135 Fed Rep., 77;
Frank *v.* Mercantile National Bank, 182 N. Y., 264;
New York County National Bank *v.* Massey, 192 U. S., 138;
Mock *v.* Market Street National Bank, 107 Fed. Rep., 897.

But the root of the appellant's trouble rests in the fact that he fails to appreciate that this $6,000 and the policies were not the property of the partnership and that the bank was under no obligation to apply the property of Mertens individually to the extinguishment of the partnership debt.

III.

The sale, as disclosed by the record, was valid, and the bank thereby became vested with the title to the policies freed of the bankrupt's right of redemption.

A.

The findings and conclusions of the Circuit Court of Appeals are conclusive in this Court, and negatived the fact that the sale of the policy was fraudulent.

By the provisions of Section 25, Par. B, the jurisdiction of this Court on appeals from final

decisions of courts of appeal, must be exercised "under such rules * * * as may be prescribed by the Supreme Court of the United States * * *."

Under the power thus conferred, this Court has provided by general order XXXVI. (3) as follows:

> "3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

These orders have the same effect as if written in the statute, and the Court in its consideration of this case, is absolutely governed by the findings of fact of the Circuit Court of Appeals, and can only review such questions of law as are raised by these findings.

> Conboy *vs.* First National Bank of Jersey City, 203 U. S., 141-144;
> J. B. Orcutt Co. *vs.* Green, 204 U. S., 96-102.

The Bank contends that it sold the policies strictly in accordance with the rights conferred by the bankrupt in the contracts under which they were pledged; that by so doing fraud could not justly be imputed to it and that it violated no provision of the Bankrupt Law; that in fact it did precisely that which the Act gave it a right to do, and having sold the policies in pursuance of the

provisions of the contracts under which they were pledged, it follows, as a matter of law, that the value of the securities was properly ascertained.

It was conceded by the appellant that these policies were delivered to a licensed auctioneer, with instructions to sell them at public auction at the New York Real Estate Salesrooms, and that on that day, at 2 o'clock, the policies were offered for sale and sold to the highest bidder. It was further conceded that the policies were offered for sale and were sold separately; one for $7,000, and the other for $3,250.

The appellant cannot be heard to impeach the sale of these policies. He has conceded that they were sold at public auction to the highest bidder, and the District Court was not warranted in finding differently upon the conceded facts.

It is elementary that fraud must be alleged. It must be proved by him who asserts it; by evidence which is clear and satisfactory, and which is susceptible of no other construction. It will never be surmised or presumed; and where the intent of an act is as consistent with the inference of good faith, as otherwise, the Courts will never presume bad faith.

Patton *v.* Taylor, 7 How., 132;
Voorhees *v.* Bonesteel, 16 Wall., 16;
Gregg *v.* Sayre, 8 Pet., 244;
Clarke *v.* White, 12 Pet., 178;
Lalone *v.* U. S., 164 U. S., 255;
Hyde *v.* M'Faddin, 140 Fed. Rep., 433-443;
Eastern Paper Bag Co. *v.* Continental Paper Bag Co., 142 Fed. Rep., 479, 501;
Maxwell Land Grant Case, 121 U. S., 325.

The appellant did not allege or prove fraud; that the bidding was stifled, or that the time when, or the place where, the policies were sold were such as to necessarily result in sacrifice or in failure to realize proper value. He did not prove that others were prepared to purchase but did not do so by reason of lack of proper information. *He did not allege or prove that the property had any greater value than that realized at this sale,* nor that he was prepared to redeem the pledge for the benefit of the estate. He has not offered to redeem. He has not proved that any other person is prepared to pay more for the property than the bank paid for it.

The suggestions of the District Court that the bank took advantage of the situation and made a sham sale of the policies for the mere purpose of cutting off the bankrupt's equity of redemption, is conclusively met by the fact that the policies realized ten thousand two hundred and fifty dollars ($10,250) rather than a nominal sum.

The $10,000 policy numbered 252314 was at the time of the sale a simple life policy, payable to the wife of the assured, if living at his death, if not living, to his children, if any.

When the appellant filed his objections to these claims he had abandoned whatever interest he may have had in this policy, and the Court below had decided that the bankrupt might retain it free of any claim of the estate.

Long prior to the presentation of these claims for allowance, the appellant made an application for an order compelling the bankrupt to transfer to him the two policies in question, among others. The matter was referred to the same referee to find and report. *He reported that the policies in question had no cash surrender value* and that

they passed to the trustee, who is entitled to take and hold them.

Upon review before the District Court, the facts as above stated, appeared in the opinion of the learned Judge, *131 Fed. Rep., 972-3,* and the following is what he said with reference to this policy:

> "December 21, 1882, The Equitable Life Insurance Society of the United States issued its policy No. 252314, assuring the life of Jacob M. Mertens. Prior to the institution of such bankruptcy proceedings this policy had become a simple life policy, payable to the wife of the assured, if living at his death; if not living, to his children, if any; and in default of child or children to the personal representatives of the assured. THIS POLICY CONCEDEDLY IS SO CONDITIONED AND INCUMBERED, AND THE INTEREST OF THE TRUSTEE THEREIN, IF ANY, IS SO REMOTE AND UNCERTAIN, THAT IT IS OF NO PRACTICAL VALUE TO THE ESTATE, AND IT WILL NOT BE FURTHER CONSIDERED, AND THE BANKRUPT WILL BE ALLOWED TO RETAIN THE SAME." (Italics ours.)

Yet it is said the bank was guilty of bad faith; that this policy was worth more than $3,250, the amount paid by the bank, and this in face of the District Court's previous decision that the appellant's interest, if any, is so remote and uncertain that it is of no practical value to the estate.

The appellant's claim that the policies have a larger commercial value than the bank paid for them "*appears*" said the referee, "to be justified by terms of the policies themselves."

The $50,000 policy provides that in 1909 the Company will pay to the holder $18,823, provided it shall not have terminated previously by lapse or death.

The bank paid for it	$7,000.00
The interest on this sum to the end of the tontine period is	2,275.00
The bank paid the 1st premium due Feb. 15, 1904	1,735.00
The interest on this to the end of tontine period is	520.50
Second premium due & paid Feby. 15, 1905	1,735.00
Interest on same	416.40
Third premium due & paid Feby. 15, 1906	1,735.00
Interest on same	312.30
Fourth premium due and paid Feby. 15, 1907	1,735.00
Interest on same	208.20
Fifth premium	1,735.00
Interest on same	104.10
Sixth premium	1,735.00
Making a total cost to Feb. 15, 1909, of	$21,346.50

The appellant at page 31 of his brief calls attention to the record in the case No. 209, upon the present calendar of this court, as substantiating his contention that the $50,000 policy also involved in that case, was there shown to have a greater value than the bank paid for it.

To thus travel beyond the findings and conclusions and indeed entirely outside of the record in this case is highly improper, and such reference will undoubtedly be entirely disregarded by this court.

That the appellant is thus compelled to go outside this record in order to bolster up his claim that these policies had a greater value than the bank paid, more strongly indicates the error committed by the Referee and the District Court than anything counsel might say.

It will also be said that the conceded facts show the policies to have a greater value than the bank paid, because Delanoie after pledging them with the Knickerbocker Trust Co. for the amount of the purchase price, obtained a further loan thereon of $2,622.75. The explanation is obvious. The premium on the $50,000 policy is $1,735.00, and on the $10,000 policy $272.50, a total of $2,007.50, which with the accrued interest on the original loan of $10,250, represents the additional loan made by the Trust Company. Naturally the payment of each additional premium increased the value of the policies. The premiums were paid, and the additional loan procured more than six months before the bank proved its claims.

But even assuming without warrant that the policies did not realize full value, still in the absence of fraud the Court was not justified in setting aside the sale.

In *Franklin Nat. Bank of N. Y. v. Newcombe, 1 App. Div., 294,* affirmed by the Court of Appeals, *157 N. Y., 699,* upon the opinion of the Court below, a note gave the plaintiff full power to sell, assign and deliver the whole, or any part of the securities, at a broker's board, or at public or private sale, at their option without advertisement or notice, and to purchase at such sale free of the pledger's equity of redemption. The bank sold the pledge and bought the collateral at its sale for less than the amount of the debt and brought an action to recover the deficiency. The court held, that the plaintiff had a right to sell without waiting for a favorable condition of the market, that the action of the plaintiffs was strictly within the terms of the contract, and that the defendants had no reason to complain. Although it was urged that there was no necessity for selling the security at the

time chosen by the plaintiff, as it was amply secured, it was held that such a situation cannot prevail to change the rule *that a creditor has a right to collect his debt when due and that no presumption arises by reason of inadequacy in the price realized if the sale was in accordance with the terms of the contract.*

So in *Wheelwright v. St. Louis, 56 Fed Rep., 164*, it was held:

> "As to the foreclosure of the pledge, it seems to have been foreclosed in a manner strictly legal. The fact that at the sale under the foreclosure the bonds brought but little, there being no fraud shown, cannot impeach complainant's title."
>
> Guinzburg *v.* H. W. Downs Co., 165 Mass., 467.
> Learned *v.* Geer, 139 Mass., 31.
> Manning *v.* Shriver, 79 Md., 41-47.

But above and beyond all of these considerations is the paramount fact, conceded and admitted by the appellant that these policies were sold at public sale to the highest bidder and purchased by the Bank for an amount, which, for all the purposes of this case, is the only amount which the Court can find is the value of these securities.

B.

The appellant's failure to offer any evidence of the facts and circumstances attending the sale, or the value of the policies, affords a presumption that such evidence if adduced, would operate to the prejudice of his contentions that the sale was fraudulent, and the prices paid inadequate.

While it cannot be said that the evidence of the disposition of these policies was exclusively within

the knowledge of the appellant, it cannot be gainsaid that he was in a position to produce, for examination under oath, every person in any way connected with the transaction. He could, if such were the fact, establish that the bank made no attempt to sell these policies at private sale; that no information was given to the bystanders, if any there were, as to the age or situation of the insured, or the nature or character of the policies; that the amount was not stated; that there were no other persons present; that the bank made no effort to ascertain the true value of the policies; that the policies had in fact a much greater value, and hence that the amount which the bank paid was so inadequate as in itself to raise a presumption of fraud.

The appellant was content to rest his case upon the mutual concessions made, and we therefore submit that his failure to call the witnesses concerned in the transaction raises the presumption, that had he done so, their testimony would have negatived the slightest inference of fraud or bad faith.

Kirby *v.* Tallmadge, 160 U. S., 379;
Runkle *v.* Burnham, 153 U. S., 216-225;
Graves *v.* The United States, 150 U. S., 118-120;
Clifton *v.* The United States, 4 How., 242-244;
Choctaw & M. R. Co. *v.* Newton, 140 Fed. Rep., 225-238;
Gulf C. & S. F. Ry. Co. *v.* Ellis, 54 Fed. Rep., 481-483.

The Circuit Court of Appeals in its opinion said (p. 822):

"The court below regarded the sale made by the bank as a fraudulent sale. There was

no evidence of fraud, unless the facts which have been referred to justify the inference of fraud. *We are at a loss to understand how fraudulent conduct can justly be imputed to a pledgee, when it appears that whatever was done in executing the power of sale was done in full compliance with the terms of the pledge, and when there is no evidence that any unconscionable advantage was taken of the pledgor or his creditors.*

Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase it himself at a valuation so inadequate as to suggest a fraudulent purpose. If the valuation in this case was unfair, the burden was on the trustee to prove the fact'' (italics ours).

144 Fed. Rep., 818.

IV.

The sale of the policies by the Bank at public auction to the highest bidder, without demand, notice or advertisement, was a valid exercise of the power conferred, effectually barring the bankrupt's right of redemption, which he had expressly waived, in the event of default in the payment of the debt.

A.

The validity of the contracts of pledge is governed by the law of the State of New York.

No federal question is involved. The contracts of pledge were made, executed and to be per-

formed in the State of New York, and the rights of the parties are governed by the law of that State.

No preference under the bankrupt act was alleged or proved, nor was there any allegation or proof that the creation of the indebtedness, or the pledge of the securities, was in fraud of the rights of the creditors or the appellant.

The question, therefore, whether, and to what extent, a pledge of this kind is valid, is a local question, and the decisions of the courts of the State of New York will be followed by this Court.

York Mfg. Co. *vs.* Cassell, 201 U. S., 344.

Thompson *vs.* Fairbanks, 196 U. S., 516-522;

Humphrey *vs.* Tatman, 198 U. S., 91;

Dooley *vs.* Pease, 180 U. S., 126-128.

B.

The contract of pledge expressly granted to the Appellant an absolute power of sale, coupled with an interest, which would have survived the death, and did survive the insolvency of the pledgor.

Of this there can be no question. The bank had under the assignment both title and possession of the policies for a period of more than two years before the filing of the petition. It has a valid debt against both the copartnership and individual estates which has never been questioned. It therefore could make a sale under the power granted and transfer title in its own name.

The leading case upon this proposition, the opinion in which was written by Mr. Chief Justice Marshall, contains such a clear exposition of the law, that further discussion becomes unnecessary.

Hunt *vs.* Rousmanier, 8 Wheat., 174;

Dixon *v.* Ewart, 3 Merivale's Rep., 322;
Corder *v.* Morgan, 18 Vesey, 344;
Knapp *v.* Alvord, 10 Paige Ch. Rep., N. Y., 205;
Houghtaling *vs.* Marvin, 7 Barb., N. Y., 412;
Hutchins *vs.* Hebbard, 34 N. Y., 24-27;
Weber *vs.* Bridgman, 113 N. Y., p. 600;
Terwilliger *vs.* The Ontario, Carbondale & Scranton R. R. Co., 149 N. Y., 86;
Conners *v.* Holland, 113 Mass., 50;
Bell vs. *Mills,* 123 Fed. Rep., 24.

In *ex parte Whiting, 2 Low., 472, Judge Lowell* reviewing the authorities said:

> "The result of them is, that a creditor who, at the time of bankruptcy, has in his hands goods or chattels of the bankrupt, with a power of sale, or choses in action with the power of collection, may sell the goods, or collect the claims and set them off against the debt the bankrupt owes him; *and this, although the power to sell or to collect would have been revocable by the bankrupt before his bankruptcy; or, in other words, the very fact of bankruptcy, in such cases, gives a sort of lien which did not exist before. This has been the law ever since Rose* vs. *Hart, 8 Taunt., 499.*" (Italics ours.)

C.

The contracts of pledge are not unconscionable or fraudulent.

The entire trend of the Appellant's argument upon this branch of the case, seems to be not that

the Bank in foreclosing the pledge, failed to comply strictly with the terms of the agreements of pledge, but that the contracts themselves are invalid, for the reason that they placed the pledgor at an unconscionable disadvantage, and hence are unenforceable as against public policy. He asserts that no authority can be cited which upholds the right of the pledgee to purchase at his own sale held without notice or advertisement. The fact is, that except in those states where the disposition of pledged property is governed by express statute, there is not a discordant note in the uniformity of decision in the various commonwealths upholding the right of the pledgee, in the absence of fraud, to buy at his own sale held without notice, demand or advertisement, when power so to do is expressly granted by the pledgor.

The decisions of the Court of Appeals of the State of New York are uniform in upholding contracts of pledge which waive the right of the pledgor to exact strict performance, on the part of the pledgee, of the common law duties of a pledgee.

Wilson *vs.* Little, 2 N. Y., 443;
Wheeler *vs.* Newbould, 16 N. Y., 392;
Milliken *vs.* Dehon, 27 N. Y., 364-369;
Stenton *vs.* Gerome, 54 N. Y., 480.

In *Baker vs. Drake, 66 N. Y., 518,* the question arose with regard to the introduction of evidence of the custom and usage prevailing in the defendant's office, who were stockbrokers, in the sale of stock without notice held on margin for customers for a failure to deposit additional margin.

The Court held:

> "The parties to the contract, however, may provide therein for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute

against public policy, or fraudulent" (head note).

In *Williams vs. The United States Trust Co., 133 N. Y., 660,* the plaintiff pledged to the defendant certain bonds as security for a loan under an agreement which gave the pledgee,

> "authority to sell the same or any securities that may be substituted in lieu thereof, on the non-performance of the promise, in such manner as they, in their discretion, may deem proper, without notice either at the New York Stock Exchange or at public or private sale, etc."

The loan not having been paid at maturity, the defendant sold the bonds without notice. Affirming the judgment upon the opinion of the Court below, and quoting therefrom, the Court of Appeals said (p. 662):

> "The rights and relations of the parties were clearly defined in the written instrument. Whatever may have been the rights of the plaintiff, and the duties of the defendant before the maturity of the loan, it is clear and indeed undisputed that after that time it could, by the terms of the instrument, sell the bonds for the payment of any balance due it, without notice to him. Hence no wrong was done to the plaintiff by the sale of these bonds, unless the written agreement was in some way modified, or the rights of the plaintiff thereunder in some way enlarged or changed."

In *Gillet vs. Bank of America, 160 N. Y., 549,* the validity of the contract of pledge in question in this case was there upheld. The question arose between the assignee of the pledgor and the pledgee, whether the property pledged was properly held as security for the payment of a note of $5,-

000, which was made by the pledgor, but payable to a third person, and which after maturity and not in the regular business of the bank, it had purchased. In addition to this note, the bank held notes which it had discounted, amounting to $35,000, secured by the same collateral; the contract printed on the collateral notes provided:

> "On the non-performance of the foregoing agreements as to furnishing additional collateral, or the non-payment of any of the above-mentioned liabilities, then, and in either such case, the said bank is authorized to sell, assign and deliver the whole or any part of the said securities, or any substitutes therefor, or any additions thereto, or any other property at any time given unto or left in the possession of the said bank by the undersigned for safe keeping or otherwise, at any broker's board or at public or private sale, at the option of the said bank, or of either of its officers, without either advertisement or notice, which are hereby expressly waived. If such securities or property are sold at public sale, the said bank may itself purchase the whole or any part thereof, free from all right of redemption on the part of the undersigned, which is hereby waived and released."

The Court held that under the terms of the contract, the Bank had the right to sell the property pledged for the $35,000 loan, but that the $5,000 note which it had purchased was not such a debt as was contemplated to be secured by the collateral deposited, and that the bank could not apply the surplus to its payment.

In *Toplitz v. Bauer, 161 N. Y., 325,* the security deposited was a policy of insurance, and the contract of pledge incorporated in the note evidencing the debt provided, that upon non-payment, the holder could sell at public, or private sale, without notice, or advertisement, and become the purchaser, and the Court said (page 332):

"In recent times the right of the parties to enter into a contract providing for a sale or disposition, without notice, has been recognized, and the disability of the pledgee to become the purchaser, it is said, may be removed by express stipulation of the parties. The pledgee doubtless had the right to exact strict performance of the contract according to its terms, and, upon default in the payment of the debt at the time stipulated, he may under a contract like this, dispose of the pledge." (Italics ours.)

See also

Bailey *v.* American Deposit Co., 52 N. Y. App. Div., 402;

Palmer *v.* Mutual Life Ins. Co., N. Y., 38 N. Y. Misc., 318;

Genet *v.* Howland and Aspinwall, 45 Barbour, N. Y., 560;

Franklin National Bank *v.* Newcombe, 1 App. Div., N. Y., 294; (Affirmed on appeal, 157 N. Y., 699).

In *Fidelity Insurance Trust and Safe Deposit Company v. Roanoke Iron Company, 81 Fed. Rep., 439,* the collateral notes contained the same provisions as in the case at bar, except that they do not expressly give the holder the right to purchase, but did grant full power to sell at discretion.

The terms of the notes are found at page 449 of the opinion. The Court said (p. 450):

"The contention of counsel for exceptants is that Gwinner, being the pledgee for these bonds, as collateral security for the payment of the note for $5,000, executed to him by the Roanoke Iron Co., could not become the pur-

chaser thereof at a sale of the same. It is undoubtedly true that where a pledgee, without authority, sells a negotiable collateral paper, he cannot become the purchaser. Colebrooke Collat., Sec. 126. *But this doctrine does not apply in a case like this where the pledgee is given full power and authority, on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor, any notice or making any demand for payment.*" (Italics ours.)

See also:

Wheelwright *vs.* St. Louis, 56 Fed. Rep., 164;
McDougall *vs.* Hazelton Tripod Boiler Co., 88 Fed. Rep., 217;
Smith *vs.* Lee, 84 Fed. Rep., 557;
Atlantic Trust Co. *vs.* Woodbridge Canal Irrigation Co., 86 Fed. Rep., 975.

In *Farmers' National Bank vs. Venner, 78 N. E. Rep., 540* (Mass. Supreme Court, 1906), the note provided that the holder might sell the bonds deposited as collateral at public or private sale, in default of payment, "with the right on the part of the holder thereof to become purchaser at such sale." The note being unpaid, plaintiff *sold the securities at public auction by a duly licensed auctioneer at the New York Real Estate Salesrooms,* and bought them in at a low price. It then sued to recover the balance of its debt on the note. The Court said at page 542:

"We do not see any ground on which it can be successfully contended that there was a lack of proper care and diligence on the part of the plaintiff bank in the sale of the col-

lateral. The fact that the bonds were sold for very much less than bonds of the same issue had been sold for previously and were sold for subsequently, and the further fact, if such was the fact, that Mr. Quinlan, who bid off the bonds for the plaintiff bank, was the only bidder, do not invalidate the sale. There is nothing to show that other bidders were not present, and mere inadequacy of price is not of itself sufficient ground for setting aside a foreclosure sale. Austin *vs.* Hatch, 159 Mass., 198; Stevenson *vs.* Dana, 166 Mass., 163; Fennyery *vs.* Ransom, 170 Mass., 303. *The note provided expressly that the pledgee might purchase at any sale of the collateral, and there is nothing, therefore, in the fact that the plaintiff bank was the purchaser to invalidate the sale.*" (Italics ours.)

See also:

Guinsburg *v.* H. W. Downs Co., 165 Mass., 467-470;
Learned *vs.* Geer, 139 Mass., 31.

In *Appleton v. Turnbull, 84 Me., 72,* it appeared that the maker of the note stipulated therein that the holder, in case of default in payment, might sell the bonds deposited as collateral, at public or private sale, as he might think best.

There was no agreement waiving advertisement, or giving the holder the right to buy. The note being unpaid at maturity, the holder after giving public notice and no other bidder appearing, bought in the bonds for about one-sixth of the amount due on the note. In holding such sale, to the pledgee, to have been invalid, the court said (p. 81):

"The pledgor may lawfully stipulate that the pledgee may purchase; and this stipulation may be made at the time of the pledge."

In *Manning vs. Shriver, 79 Md., 41,* it appeared that the note given authorized the holder "to sell the collateral security at any broker's board, or at public or private sale, without advertisement or notice to me, and with the right on his part to become the purchaser thereof at such sale or sales freed and discharged of any equity of redemption."

The note not being paid at maturity, plaintiff offered the stock for sale *without advertisement at a broker's board, and there being no bid, bought it in for about one-eighth of the amount due on the note, and sued for the balance.* In affirming the judgment for plaintiff, the court said: (p. 46):

> "Then again it is argued, that the money loaned to the defendant was money belonging to Mrs. Semmers, and that the note was made payable to the plaintiff as agent, and it was as agent that he was authorized to sell and buy the stock, and thus holding a fiduciary relation to the parties, the plaintiff could not buy at his own sale. * * * But it is equally well settled that this rule does not apply where the pledgor expressly authorizes the pledgee not only to sell the pledge, but to purchase it in his own right. * * * (p. 47). The purchase by a pledgee in such cases is exempted from the operation of the general rule upon the same ground that a mortgagee will be allowed to buy at his own sale, if the mortgagor so agrees."

In *Iron City National Bank v. Rafferty, 207 Pa., 238 (1903)*, it was held, in a case where the note given on a loan of money, gave the holder the right, after default in payment, to sell the collateral security, at public or private sale, without demand, notice or advertisement, that the holder may in good faith and without negligence,

sell the security at private sale without notice or advertisement for less than its face value.

In *Jeanes's Appeal, 116 Pa., 573,* the note authorized the holder, on default in payment, to sell the collateral security, without notice or demand. After default, the holders sold the securities without notice. The debtor then filed this bill to redeem, etc. In reversing the judgment for plaintiff, the court held that the pledgees had the right to sell upon default at public or private sale without demand or notice.

In *McManus v. Sweatman, 22 Weekly Notes of Cases, 54* (Pa. Supreme Court), the note authorized the holder, on default in payment, to sell the security at a broker's board, or at public or private sale without notice, and to become the purchaser. On default in payment, the holder sold the security and became the purchaser at less than the face of the note.

The court stated the rule as follows (p. 57):

> "As holder of the note, plaintiff below had a right * * * to sell it (the collateral security), and become the purchaser himself."

In *National Bank of Illinois vs. Baker, 128 Ill., 533,* the note provided for a disposition of the collateral at either public or private sale, without notice by advertisement or otherwise. It was held by the court that parties may by contract agree that the pledge may be sold without previous notice, demand or advertisement.

In *McDowell v. Chicago Steel Works, 124 Ill., 491,* it was said at page 497:

> "But where the pledge is accompanied by a special contract as to sale upon non-payment of the debt, the right to sell is conferred, not by the law, but by the contract itself, and

hence must be exercised in the mode specified by the parties in their agreement."

And held that the contrary ruling in *Rozet v. McClellan, 48 Ill., 345,* was merely *obiter.*

In *Harris vs. Thomas, 37 Ill. App., 517,* the agreement provided that the appellee was authorized and empowered "to sell said property at public or private sale, without notice or demand of payment, at any time thereafter, for such price as he may deem best. In case of such sale, I hereby release and absolve said R. Bullen from all claims and demands of every name and nature."

An action was brought in replevin by the pledgor. It developed upon the trial that an agent of the pledgee, acting under his instructions, sold the property. The court was asked to charge that upon default, the pledgee was authorized to sell the pledge without notice to the pledgor, and that if the pledgee's agent did in fact sell the property without notice to the plaintiff, and that such sale was made in good faith, the pledgor could not recover. This the Court refused to charge. Upon appeal it was held:

> "The debt secured by the pledge was payable at a fixed time by the terms of the contract of pledge, therefore no demand of payment was necessary, and the contract expressly authorized a sale without notice. A sale of the pledge was clearly proved, and if rightfully made, under the authority in the contract, there was no conversion of the property, and all the appellee would be entitled to recover, would be what the property brought on the sale in excess of the amount loaned on it and interest thereon."

In *Cole vs. Dalziel, 13 Ill. App. 23,* the note provided that the collateral security upon default

might be sold at public or private sale with or without notice. The Court said (p. 26):

> "But in this case, the pledgee had the special power given him by the pledgor to sell the pledge, at any time before or after the debt became due, at public or private sale, with or without notice. * * * The rightful exercise of the power of sale was not dependent upon the giving of any notice whatever to the plaintiff. The notice which, in ordinary cases, would be indispensable to the right to sell the pledge, was here waived. *The sale, which it was claimed, constituted an unlawful conversion of the pledge, was not made in contravention, but in pursuance, of the express power given. The sale, so made, would undoubtedly pass a good title to the purchaser. In making it, the defendant did nothing which he was not expressly authorized to do. That being so, such sale could not amount to an unlawful conversion, and trover would not lie.*" (Italics ours.)

In *Glidden vs. The Mechanics' National Bank, 53 Ohio St. Rep., 588,* the note granted the pledgee "authority to sell the same on the non-performance of this promise, in such manner as they in their discretion may think proper, without notice either at public or private sale, *etc.*"

The Court said (p. 599):

> "This requirement of notice may be waived by the pledgor, either in the contract of pledge, or afterward; and by the agreement between the parties in this case, the bank was expressly authorized to sell the property pledged to it by Glidden, without notice."

In *Choteau vs. Allen, 70 Mo., 290,* the note provided that the pledgee might sell the pledge at a broker's board, at public or private sale, or other-

wise at their option on the non-performance of the obligation and without notice. Advertisement was not waived. Default was made, and the property was sold at public auction in the City of New York; the pledgees became the purchasers. The Court held in substance, that the rule that the pledgee of personal property before selling, must demand payment of the pledgor, or give him notice of the time and place of the intended sale, may be waived by agreement between the parties, and has no application to cases where by the contract, a definite time is fixed for the payment of the debt. In either of these cases, sale may be made without notice or demand; and that the rule that the pledgee cannot buy at his own sale of pledged property, may be waived by express agreement of the parties.

In *Carson vs. Iowa City Gas Light Co., 80 Iowa, 638*, the contract of pledge permitted the pledgee upon a failure to pay the loan when due, to sell the shares without advertisement, or notice, at public or private sale. The loan being unpaid, the pledgee sold the collateral at private sale without notice for $7,000, the par value was $50,000.

The Court said, at page 645:

> "But, where the parties stipulate in the writing making the pledge that the sale may be private, without notice, and without demand, a sale made in the manner provided for by the contract is valid. * * * There is no reason why the parties may not waive the requirements of demand and notice."

In *Dullnig vs. Weekes, 16 Texas Civil Appeals, 1*, it was held that a power of sale contained in a note given on the loan of money, authorizing a private sale of the bonds deposited as collateral

security, "without advertisement or notice, authorized a sale without notice, *either to the public or to the pledgor.*"

In *Barry Bros. v. White Lead & Color Works, 107 La., 236,* it was held that a pledgee of bonds under a contract providing for a sale thereof at public or private sale, on default in payment, with privilege to the pledgee to become the purchaser, authorized the pledgee to buy in the bonds at such sale.

The Court below in this branch of the case said (p. 821):

> "The bank's claim against the individual estate was for an indebtedness of $9,118, the balance alleged to be due from Jacob M. Mertens, after crediting his account with the proceeds of the sale of the two policies which had been pledged to the bank as collateral for the payment of the indebtedness. The pledge was made long prior to the filing of the petition in bankruptcy, and it is not asserted that it was preferential. By its terms the bank was authorized, upon default in the payment of any part of the indebtedness, to 'sell, assign, or otherwise dispose of the said collateral security at public or private sale, with or without notice to the pledgor,' and to 'purchase the whole or any part of the property sold free from any right of redemption' on the part of the pledgor. After the petition in involuntary bankruptcy, and on September 14, 1903, the bank caused the two policies to be sold by an auctioneer at a public salesroom, without any notice having been given to any person except its own agents. There was no competition at the sale, and upon the bid of its own agent the bank became the purchaser for the sum of $10,250. *No testimony was offered by the trustee to show that the value of the policies was greater than the amount of the bid, and there is no evidence in the record of the value independently of the bid.*

If this was such a sale as was authorized by the terms of the pledge, we do not doubt that the bank in making it was within its rights, and that no rule of the common law or doctrine of equitable jurisprudence, and none of the provisions of the Bankrupt Act, can be invoked to defeat or invalidate it.

Except for the terms of the pledge, the sale would have been voidable; if for no other reason, because the bank purchased the policies (Story on Bailments, § 319). But in this respect, as also with respect to a private sale without notice, the pledgor had by his contract consented in advance to that which was done by the bank. Indeed, by the stipulation of such a pledge as this was the pledgor in effect commits the disposition of his property, in case of his failure to pay his obligation, practically to the honor of the pledgee, and releases the pledgee from all the legal obligations which would ordinarily rest upon him in disposing of the property to satisfy his demand. The authorities sanction such contracts. In Baker *v.* Drake (66 N. Y., 518) it was decided that the parties to a transaction which creates the relation of pledgee and pledgor between them, may provide by contract for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute, against public policy, or fraudulent. In Toplitz *v.* Bauer (161 N. Y., 332) the court said: 'In recent times the rights of the parties to enter into a contract providing for a sale or disposition without notice have been recognized, and the disability of the pledgee to become a purchaser, it is said, may be removed by express stipulation of the parties.' In Williamson *v.* United States Trust Co. (133 N. Y., 660), where the terms of the pledge authorized the pledgees to sell the securities 'in such manner as they in their discretion may deem proper, without notice,' the sale without notice was upheld. In Fidelity Insurance Co. *v.* Roanoke Iron Co. (81 F. R., 440) it was de-

cided that the holder of collateral security for a debt, who had been given by the terms of the pledge full power and authority, on failure of the debtor to pay, to sell the collateral at public or private sale, and without advertising or giving the pledgor any notice or making any demand for payment, may buy such collateral, at a sale conducted in good faith, and thereby acquire a good title. The court said: 'It is undoubtedly true that where a pledgee without authority sells negotiable collateral, he cannot become the purchaser; but this doctrine does not apply in a case like this, where the pledgee is given full power and authority, on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor any notice or making any demand for payment. * * * It would be imposing great hardship and injustice upon the pledgee, under the circumstances of this case, to say that while acting under the authority given him by the pledgor, and in good faith, he shall be required to stand by and see the only security he has for the payment of his debt perhaps sacrificed, and he not permitted to protect his interests in the only way he can, by becoming the purchaser himself.' It will be noticed that in that case there was no stipulation authorizing the pledgee to become the purchaser. See also Manning *v.* Shriver (79 Md., 41); Appleton *v.* Turnbull (84 Me., 72); Chouteau *v.* Allen (70 Mo., 290). It may happen that a pledgee will be unable to obtain from others the sum which he believes he may be able to realize from the property by purchasing it himself, and disposing of it when a favorable opportunity offers. If the pledgor sees fit to consent to a stipulation like those in this case, there would seem to be no reason why he should not be held to the contract."

V.

The referee had no power to direct a resale of the policies, as they had been properly liquidated by the bank under the provisions of Section 57, subdivision H of the Bankruptcy Act.

A.

The District Court erred in its construction of this section.

Sub-division H of Section 57 provides:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the Court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The District Court in its opinion, said:

> "It is evident that the Act contemplates a determination of the value of securities held by secured creditors in one of two ways—either by converting the same into money, according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by the joint action of the creditors and trustee pursuant to an agreement, arbitration, compromise, or litigation entered into by them; *and that the Court may direct the ascertainment of the value of such securities in either manner*" (fol. 48, p. 26). (Italics ours.)

If this construction is correct, the Court could, if it saw fit, entirely disregard the method prescribed by the parties, and direct that the securities be disposed of, either by agreement between the creditor and the trustee, arbitration, compromise or litigation.

To construe Subdivision H of Section 57 as investing the Court with power to prescribe a method of disposing of the pledge, different from that agreed upon between the parties, would result in depriving the creditor of vested rights, and is in contravention of the provisions of Subdivision D of Section 67, which expressly exempts from the operation of the law, contracts of pledge which are *bona fide*.

It was never intended by Congress that the Court should have the right to prescribe a different method of disposing of the pledge than the one agreed upon by the parties. The correctness of this contention is at once manifest when we analyze this subdivision. It provides:

> "That the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors."

If we stop here, there can be no doubt that a perfect and complete mode of disposing of the pledge is thus provided for; but Congress recognizing that pledges of personal property are frequently made, without any express agreement for a disposition thereof, and contemplating the possibility of disputes as to how the pledge should be disposed of, or its value ascertained, provided that the creditor and the trustee may either by agreement, arbitration or compromise arrive at the de-

sired result; or if agreement, arbitration or compromise is impossible, then by litigation.

The Court by this subdivision is only given the power to direct a disposition of the pledge, or the ascertainment of its value, *if the parties have failed to do so by their own agreement, and then only as provided by this subdivision.*

The phrase "as the Court may direct" has no grammatical or logical relation to the opening phrase: "the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors." It limits and applies to that which follows the preposition "or," *i. e.*, "by such creditors and the trustee, by agreement, arbitration, compromise or litigation." That this is the correct analysis is plain when the phrase "as the Court may direct" is transposed as though it read:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities are delivered to such creditors; or, as the Court may direct, by such creditors and the trustee by agreement, arbitration, compromise or litigation."

That we are correct is further apparent from the fact that if the Court could, irrespective of the contract rights of the creditor, direct a different method of disposition, the language "the value of securities held by secured creditors, shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors" becomes surplusage. It would be immaterial what method the parties themselves

agreed upon, because the Court, notwithstanding, would have the right to direct that the pledge be disposed of otherwise.

But it is most respectfully submitted that subdivision H of Section 57 only becomes operative in the event *that the securities have not been disposed of by the creditor at the time he seeks to prove his debt.* If he has disposed of his securities before filing a claim, he has no securities to liquidate. If he was himself the purchaser under a contract granting him that right, he holds the absolute title free of the equity of redemption and sets off the proceeds against the debt.

We do not contend that the Court is without power to disregard a dispostion of the pledge which is fraudulent, or contrary to the terms of the contract under which the securities were delivered to the creditor. That is another question. But if the dispositon of the securities *prior* to the time of the filing of the claim is strictly within the legal rights conferred, the Court is not at liberty to disregard what the parties themselves provided for, and upon the faith of which the creditor has advanced his money.

The Act of 1867 did not provide for a valuation of securities held by a secured creditor in accordance with the terms of the agreement under which the securities were pledged. Under that act, a creditor seeking to prove a claim thus secured, could only liquidate his security under the direction of the court. Failing to do so, he was precluded from proving his claim, or participating in the distribution of the estate.

Section 20, Act of 1867;
McHenry La Société Française D'Epargnes, 95 U. S., 58.
Davis *vs.* Anderson, 6 N. B. R., 146 Fed. Cases, 3623;

In re California Pacific Railroad Co., 3 Sawy., 240, s. c., 11 N. B. R., 193;
Smith *vs.* Kehr, 2 Dill, 50, s. c., 7 N. B. R., 97;
In re Morrison, 10 N. B. R., 105 Fed. Cases, 9839.

Notwithstanding, it was uniformly held as will be seen in a subsequent subdivision of this brief, that even where there was no express stipulation in the contracts of pledge, the pledgee might sell on default of the pledgor, such right being presumable from the nature of the transaction, and that nothing in that Act took away any right from the pledgee secured to him by his contract.

Jerome v. McCarter, 94 U. S., 734.

Mr. Justice Ray evidently recognizing his error, has since adopted the construction for which we contended.

In re Castle Braid Co., 145 Fed. Rep., 224.

The Court below, in its opinion upon this point, said (p. 823):

> "That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy is indicated by the change made in the present Act with respect to the proof of claims by secured creditors. By the former Act it was provided that a secured creditor should be admitted as a creditor only for the balance of his debt, after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the Court. Under that pro-

vision, if a pledgee sold the pledged property prior to the appointment of the assignee, or without the permission of the court, he was precluded from proving his claim or obtaining any share of the bankrupt's estate to which he would otherwise have been entitled. The present Act provides that the value of his security may be determined, among other methods, by converting it into money pursuant to his contract rights, and thus, if he has enforced it as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim. Section 57, Subdivision H, prescribes several modes of valuation, and the one referred to is exclusive of the others and is superfluous and useless, unless it is intended to authorize the creditor, without interference by the trustee of the court, to value his own security, provided he turns it into money 'according to the terms of the agreement pursuant to which' it was delivered to him."

144 Fed. Rep., 818.

B.

The rule that the burden of proceeding was upon appellant, was not affected by the fact that the claim against the individual estate is secured.

Attention has been called on p. 21 of this to the authorities which maintain the proposition that the burden of proceeding in the first instance rested upon the appellant to sustain his objections.

It will be said that these cases do not apply, because they do not deal with secured claims, and further that whatever the rule in this respect might be in the first instance, it cannot be invoked by the bank because upon the hearing, it voluntarily chose to proceed, and did so by submitting the stipulations of fact.

The appellant's first criticism is met by the decision of Mr. Justice Ray, *In re Castle Braid Co.*, 145 Fed. Rep., 224. There, speaking of a secured claim, he said (p. 229):

> "In regard to the claim of Meyer W. Schloss and Joseph W. Schloss jointly on the contract of agreement in question, I am of the opinion that, under Sub-division H of Section 57 of the Bankruptcy Act, the mode of ascertaining the value of the securities held by the claimants (the mode not being fixed by any agreement between the parties in interest) is discretionary with the Court. *But this does not affect the general and broader question as to whether or not the burden of proceeding to prove their claim rests now upon the claimants.* * * * (and at p. 233) As the corporation had the benefit of full performance by the claimants,and there has been no rescission or restoration or offer to restore, and no fraud or unfairness is apparent on the face of the contract, *it seems clear a valid claim, prima facie, is made out by the proofs, and that the burden of proceeding in the contest, not of proof, now rests on the trustee contesting. The authorities are that way.* * * * (and at p. 235) The question submitted is therefore answered that the burden of proceeding now rests upon the trustee contesting, and not upon the claimant" (italics ours).

In regard to the appellant's second criticism, it is sufficient to state, that the concessions were *mutual*, and in no way affected the question of the burden of proceeding.

The appellant was not content to abide by his motion for a disallowance of the claims, and thus rely upon what he terms a motion for non-suit. He went further and by moving the Referee to direct a re-sale, he clearly evidenced his purpose to rest his case without affirmative proof and seek judgment absolute on the merits.

C.

The referee had no power to divest the bank of its title to the policies and direct a re-sale.

The Referee, as stated, not only refused to allow the claims, but went further, and assumed, against the bank's objections, to adjudicate its title to the policies, and decreed a re-sale (fols. 21-22).

The question of the bank's title was in no sense an incident to the proof of the claim. The bank, by offering its claim for allowance, did not thereby submit to the Court's jurisdiction the question of title. Undoubtedly if the evidence justified a finding that the sale was fraudulent, the Court had power to refuse to allow the claim and thus prevent the bank from participating in a distribution of the estate. But it had no authority to adjudicate that the Bank obtained no title to the policies and decree that they be resold. The Bank was an adverse claimant, and had the right to have litigated by a plenary action in a Court of competent jurisdiction its title to the policies.

In *Fitch* v. *Richardson,* 147 Fed. Rep. 197, a creditor holding as security a lease running to his debtor, on its expiration obtained a renewal to himself without the debtor's knowledge. The creditor filed a claim as unsecured against the estate of the debtor. The allowance of the claim was objected to by the Trustee on a petition for reconsideration, alleging that the creditor held the lease as collateral for the debt, and by which it had been paid in full. The District Court sustained the trustee's position, finding not only, that the claim offered was secured, but valued the security in a sum in excess of the amount of the claim entering judgment against the creditor for

that amount, resting the judment on the proposition that the creditor had appropriated the security to his own use, and that according to the rules of equity practice, the question with reference to the proof of the claim involved a determination of all other questions incidental thereto.

From this decree, the creditor appealed. The Circuit Court of Appeals reversing the District Court, held (p. 198):

> "The other question on this record arises from the fact that the District Court not only found that the claim offered in proof was secured, but valued the security at $1339. in excess of the claim, and entered judgment against the creditor for that amount. * * * But the judgment by which the District Court ordered the creditor to pay the amount named was against an adverse claimant, and therefore was within the decision of Bardes vs. Hawarden Bank, 178 U. S., 524, and other decisions of that class, holding that a court sitting in bankruptcy has no jurisdiction over an adverse claim without the consent of the parties; and it was not within Pirie *vs.* Chicago Co., 182 U. S., 438, where the order to return dividends received was purely an incident to the proof of a claim which had been rejected.
>
> It is true that in bankruptcy proceedings questions of right are governed by the rules of chancery; but the practice of courts in bankruptcy with reference to topics like that before us is statutory.
>
> The nature of their powers with regard to the matters to which this appeal relates is expressed by Paragraph 6 of General Orders xxi, limiting proceedings with reference to a reconsideration of claims to the mere matter of expunging or diminishing them. This, of course, is subject to the right of the courts in bankruptcy, on a proper proceeding, to liquidate property found in the possession of

> the bankrupt, as provided by Section 38, or as otherwise provided by law; but nothing anywhere gives them jurisdiction to enter a decree against a creditor for the excess value of property held as security in the matter and under the circumstances which this recor brings before us."
>
> First National Bank of Chicago *vs.* Chicago Title & Trust Co., 198 U. S., 280.

Should it be claimed that the order, directing a resale is not a part of the record and was not considered below, it is sufficient to call the court's attention to the following.

The order directing a resale appears at (fol. 41). At folio 43, it appears that the District Court considered the order. At folio 78 it appears that the orders appealed from affirmed orders and rulings of the Referee refusing to allow the claims and directing that the value of the securities be determined by a resale at public auction. The Court below found:

> "Thereupon the trustee asked the Court under Subdivision H of Section 57 of the Bankrupt Act to direct a resale of the policies upon notice to the trustee, to which the claimant objected as not being authorized by the bankruptcy act or practice. Subsequently the Referee granted such motion. (9th Finding, fol. 116, p. 66.)"

D.

The Circuit Court of Appeals did not err by directing the allowance of the claim against the individual estate.

It will be said that the Court below should have remitted the case with instructions to permit the Appellant to introduce evidence.

There is no merit in this, for the reason that the Appellant had his day in Court, and failed to avail himself of the opportunity to substantiate his objections by affirmative evidence.

The Appellant wholly disregards in this connection, the fact that he did not remain content with his motion for a disallowance of the claims, but rested his case by moving for judgment absolute on the merits, which was granted by the Referee by directing a resale.

The *Matter of Livingston, 144 Fed. Rep., 971,* cited by the Appellant in this connection, is clearly distinguishable. There the claimant voluntarily *assumed* the burden of proceeding, and at the close of his *prima facie* case, the trustee moved that the claim be disallowed. The Referee granted the motion and disallowed the claim. The District Court reversed the Referee's order and directed that the claim be allowed as filed. This, upon appeal, was held error, because by such disposition, the claim was allowed without any opportunity to the trustee to put in what proof he might be able to produce tending to controvert the case made by the claimant.

VI.

The filing of the petition and the appointment of the appellant as trustee did not divest the Bank of any of the rights or remedies secured to it by the contracts of pledge.

A.

The Appellant, as trustee, obtained no better title to, or greater rights in the property of the bankrupt, than the bankrupt or his creditors had as of the date of the adjudication.

The Appellant's title as trustee, is conferred and governed by the provisions of Section 70 of the Act of 1898.

This section consists of Paragraphs A to F inclusive, of which "A" and "E" need only be noted.

Paragraph "A" it will be observed, contains, after the opening sentence, six subdivisions, and so far as material provides:

> "The trustee * * * upon his appointment and qualification, * * * shall in turn be vested by operation of law with the title of the bankrupt, *as of the date he was adjudged a bankrupt,* * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; * * *." (Italics ours.)

Paragraph E, of the same section, provides:

> "The trustee may avoid any transfer by the bankrupt of his property which any

> creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value *prior to the date of the adjudication.* Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value * * *." (Italics ours.)

It must always be remembered that the validity of the debt, and the transfer of the collateral as security for its payment, has never been questioned. When the petition was filed, the bank had a valid lien upon these policies for the payment of its debt. The contracts under which they were pledged, are, as we have already shown, valid and enforceable under the law of the State of New York where the debt was incurred and the lien created.

The Bankrupt Act does not attempt by any of its provisions to deprive a lienor of any right or remedy which the contract, valid under the law of the State where made, vested him with. In fact, the lien thus created, is expressly exempted from the operation of any of its provisions.

This is clearly indicated by the language of Section 67, Subdivision D, which provides:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

In *New York Economical Printing Company, 110 Fed. Rep., 514,* the Court, construing the title of the trustee, said (p. 518):

> "The Bankrupt Act does not vest the trustee with any better right or title to the

bankrupt's property than belongs to the bankrupt or to his creditors *at the time when the trustee's title accrues.* The present Act, like all preceding Bankrupt Acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors, shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the Act, which is fraudulent as to creditors, or invalid as to for want of record, it is invalid as to the trustee; and if it is one which is invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor." (Italics ours.)

In *Hewit v. Berlin Machine Works, 194 U. S., 296,* the bankrupt obtained possession of certain machines upon conditional sale, title to remain in the vendor until paid for. The machines came into the possession of the trustee. Thereupon the vendor sought to obtain possession but the referee held that it had lost its lien because of a failure to comply with Section 12, Chapter 418 of the Laws of 1897, State of New York, requiring that the bill of sale be filed.

The District Court, upon review, reversed the referee. Thereupon the trustee appealed to the Circuit Court of Appeals which affirmed the District Court. This Court affirming the Circuit Court of Appeals, said (p. 302):

> "The District Court, Hazel, J., held that the reasonable construction of this provision was that the trustee was vested with the title which the bankrupt had to property situated as described, and not otherwise, and quoted from the opinion of the Circuit Court of Appeals for the Second Circuit in the case of *In re New York Economical Printing Company, 110 Fed. Rep., 514,* upholding that view" (quoting the excerpt above).

"And the Circuit Court of Appeals, adhering to that decision, held in this case that, in as much as by the New York Statute a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the District Court was right, and affirmed the judgment. *We concur in this view which is sustained by decisions under previous bankruptcy laws.*" (Italics ours.)

In re Garcewich, 115 Fed. Rep., 87-89;

In re Kellogg, 118 Fed. Rep., 1017.

In *Thompson v. Fairbanks, 196 U. S., 516*, the question arose with reference to the enforcement of a lien acquired by the mortgagee taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage made and recorded prior to the passage of the Act, possession being taken, however, within four months of the filing of the petition in bankruptcy, while the mortgagor was insolvent and was considering going into bankruptcy.

The Court said, referring to the provisions of the Act of 1867 (p. 526):

"Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that 'except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens and incumbrances thereon, whether created by his act or by operation of law.'" (Citing cases.)

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases

unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provisions of the Act. * * * (And at page 525.)

"There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the Act, by virtue of which mortgage and because of the condition broken, the title to the property becomes vested in the mortgagees, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not in such circumstances occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated."

In *Humphrey v. Tatman, 198 U. S., p. 91,* the question arose whether the taking possession of after-acquired property, within four months of the filing of the petition in bankruptcy, under a mortgage made in good faith prior to that period, is good or void as against the trustee in bankruptcy. *The mortgage was not recorded and the goods remained in the possession of the mortgagor.* Within four months of the filing of the petition, the mortgagee, having reasonable cause to believe that the mortgagor was insolvent, took possession of the goods under the terms of the mortgage, although against the wishes and protests of the mortgagor.

The Court held upon the authority of *Thompson v. Fairbanks, supra*:

"Whether the taking possession of after-acquired property within four months of the filing of the petition in bankruptcy, under a mortgage made in good faith prior to that period, is good or is void as against the trustee in bankruptcy, depends upon whether it is good or void according to the law of the State." (Head note.)

See also—

York Manufacturing Co. *v.* Cassell, 201 U. S., 344.

But it will be said that there is no distinction between the act of 1867 and 1898 as to the time when the trustee's title vests. This is incorrect.

Under the former act, no reference was made to the date of the adjudication as effecting the vesting of the trustee's title. It provided that as soon as an assignee was appointed and qualified, the judge or register should by instrument assign and convey to him all of the property of the bankrupt:

"*And such assignment shall relate back to the commencement of the proceedings in bankruptcy,* and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." (Italics ours.)

U. S. Rev. Stat., Section 5044.

Comparison between this section and 70A (5) of the Act of 1898, will disclose that in the latter, there is omitted the provision that the trustee's title "shall relate back to the commencement of the proceedings in bankruptcy," *i. e.*, the filing of the petition.

To sustain the appellant's contention, and hold that the time when the trustee's title vests is the

same under both acts, would result in obvious violence to the language employed in the later act, and utterly fail to give weight to the omission of the italicized phrase found in the earlier law.

It is a cardinal rule of construction that when the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose.

Bardes *v.* First National Bank of Hawarden, 178 U. S., 524;
Pirie *v.* Chicago Title & Trust Co., 182 U. S., 438-448.

Referring to section 70 of the Act of 1898, the House Committee on Judiciary in its report, said:

> "Under section 70 an important change has been made from the former laws, as well as from proposed legislation. Under the act of 1867, as interpreted by the Courts, it was held that the title of the bankrupt's property vested in the assignee *as of the date of the filing of the petition in bankruptcy.*
>
> This bill provides that the trustee shall 'be vested by operation of law with the title of the bankrupt *as of the date he was adjudged a bankrupt.*' By this change, the alleged bankrupt can sell and convey a perfect title up to the date of the adjudication, and the purchaser does not buy at his own risk and in danger of having secured an imperfect title by reason of an adjudication which may be made subject (subsequent) to the purchase. It does not follow that because a petition is filed against a person in a bankruptcy court, he will be adjudged a bankrupt, and it seems but proper that the public in dealing with him until he is adjudged a bankrupt should deal without fear of loss or danger as to title." (Italics ours.)

House Report No. 1228, 54th Congress, 1st Session, p. 14.

It will also be said that by virtue of Subdivision 5 of Section 70A, the trustee takes title to all property which, on, or prior thereto, he could have transferred, or which might have been levied upon under process against him.

This argument is predicated upon the erroneous assumption that Subdivision 5 amplifies the opening sentence of Paragraph A, and extends its operation so as to relate back to the date of the filing of the petition as to the time when the trustee's title vests to the property referred to in that Subdivision.

A moment's consideration will at once disclose the incorrectness of this construction.

This paragraph treats of two separate subjects:

First.—The time when, or at which the title to something vests in the trustee.

Second.—The "something" or property, the title to which is to vest in the trustee.

In other words, the trustee is vested with the title of the bankrupt as of the date of the adjudication, but by Subdivision 5 to such property which prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon, or sold under judicial process against him. This subdivision limits the particular kind of property, but even as to this, the trustee's title vests as of the date of the adjudication.

Subdivision 5 of Paragraph A of this Section, as well as the others numerically designated, simply specify the character of the property to which the title of the bankrupt shall vest, but in

no sense operates as to the time when it shall vest.

Congress's intention to depart from the provisions of the prior act, and the decisions under it, is further plainly shown by subdivision "E" of the same section, which provides that the trustee may avoid any transfer which any creditor might have avoided, unless the person to whom the transfer was made was a *bona fide* holder for value *"prior to the date of the adjudication."* Thus unmistakably indicating that the bankrupt notwithstanding the filing of the petition might in good faith and for value, sell or encumber his property at any time prior to adjudication.

Hewitt *v.* Berlin Machine Co., 194 U. S., 296-302.

B.

The filing of the petition did not suspend or enjoin the exercise of the power of sale conferred by the contracts of pledge.

As we have pointed out, the title of the trustee in bankruptcy, under the provisions of the Act of 1867, vested as of the date of the filing of the petition. Notwithstanding this fact, however, the authorities were uniform that a pledgee is not deprived of the right to sell the pledged property upon default in the payment of the debt in accordance with the terms of the contracts of pledge.

Jerome vs. McCarter, 94 U. S., 734, is absolutely decisive and controlling.

There certain mortgaged bonds had been pledged as collateral security for loans. Bankruptcy proceedings intervened and a receiver was appointed. Subsequently the bonds were sold by

the pledgees and the contention was made that the pledgees could not dispose of the pledge after the adjudication in bankruptcy. The Court said:

> "THERE IS SOME PROOF THAT, WHEN THE COMPANY BECAME BANKRUPT (Aug. 28, 1872), SOME OF THE BONDS WERE HELD AS COLLATERALS FOR LOANS MADE TO THE COMPANY SMALLER IN AMOUNT THAN THE BONDS PLEDGED. BUT THE BONDS WERE SUBSEQUENTLY SOLD BY THE PLEDGEES, AND THE PRESENT HOLDERS HOLD THEM BY ABSOLUTE RIGHT. THE POSITION THAT THE PLEDGEES COULD NOT SELL THE PLEDGE AFTER THE ADJUDICATION IN BANKRUPTCY, IS QUITE UNTENABLE. IT IS SUSTAINED BY NOTHING IN THE BANKRUPT ACT. THE BONDS WERE NEGOTIABLE INSTRUMENTS. THEY PASSED BY DELIVERY, AND EVEN WHERE THERE IS NO EXPRESSED STIPULATION IN THE CONTRACTS OF PLEDGE, THAT THE PLEDGEE MIGHT SELL ON DEFAULT OF THE PLEDGER, SUCH A RIGHT IS PRESUMABLE FROM THE NATURE OF THE TRANSACTION. CERTAINLY THE BANKRUPT ACT HAS TAKEN AWAY NO RIGHT FROM A PLEDGEE SECURED TO HIM BY HIS CONTRACT."

It further appeared in that case that some of the bonds were still held by the pledgee and the plaintiff sought to prevent the dispositon thereof. The Court said:

> "In regard to the bonds covered by the McCarter mortgage, which is the one now in suit, we find no error in the decree of which the appellants can complain. Most of those bonds, though at first issued as collaterals for loans made to the mortgagors, have been sold and they are now owned by the purchasers. THERE ARE SOME, IT IS TRUE, THAT ARE STILL HELD IN PLEDGE; BUT THE PLEDGEES HAVE A CLEAR RIGHT TO USE THEM, EITHER BY SALE OR BY COLLECTION, UNTIL THE FULL AMOUNT OF THE DEBT DUE FROM THE MORTGAGORS IS SATISFIED."

See also:

Cook *v.* Tullis, 18 Wall., 332;
Gibson *v.* Warden, 14 Wall., 244;
Marshall *v.* Knox, 16 Wall., 551;
Avery *v.* Hackley, 20 Wall., 407;
Clark *v.* Iselin, 21 Wall., 360;
Eyster *v.* Gaff, 91 U. S., 521;
Sawyer *v.* Turpin, 91 U. S., 114;
Yeatman *v.* The New Orleans Savings Inst., 95 U. S., 764;
Stewart *v.* Platt, 101 U. S., 731;
Davis *v.* Friedlander, 104 U. S., 570;
Hauselt *v.* Harrison, 105 U. S., 401;
Adams *v.* Collier, 122 U. S., 382-390;
Bacon *v.* International Bank of Chicago, 131 U. S., CCXVI;
In the Matter of Irving, Blatch., J., 8 Ben., 463;
Sedgwick *v.* Grinnell, 9 Ben., 429;
Mitchell *v.* Winslow, 2 Story, 630;
In re Grinnell, 9 N. B. R., 137, s. c. Fed. Cases, 5829;
McGready *v.* Harris, 9 N. B. R., 135;
Fidelity Insurance Trust & Safe Deposit Co. *v.* Roanoke Iron Co., 81 Fed. Rep., 439;
Laughlin *v.* Calumet & Chicago Canal & Dock Co., 65 Fed. Rep., 441;
Fisher *v.* Lewis, 69 Mo., 629.

We might very well rest the discussion upon the authority of *Jerome* vs. *McCarter* and cases cited, were it not for the fact that it will be said that while the bank may have had the right to dispose of the pledge without notice *after* the adjudication, its right to do so *before* the adjudication was suspended by virtue of the filing of the petition, and until the adjudication.

There is no provision of the act, or decision under it, which justifies such an argument in a case of this character. In fact, *Jerome* vs. *McCarter* is diametrically opposed to it, holding as it does in express terms "that even were there no express stipulation in the contracts of pledge that the pledgee might sell *on default*, such a *right* is presumable from the nature of the transaction. Certainly the bankrupt act has taken away no right from the pledgee secured to him by his contract."

That the pledgee might sell *on default* does not mean that his rights are suspended pending a petition for an adjudication which might or might not occur. He is not called upon to sit idly by and await the pleasure of the parties to the litigation, or hazard his security by the possible delays attendant upon bankruptcy proceedings.

The appellant will attempt to sustain his position, by quoting an expression contained in the decision of this Court in the case of *Mueller* vs. *Nugent*, 184 U. S., 1-14 and kindred cases. It was there said:

> "It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction. Bank *vs.* Sherman, 101 U. S., 403."

To excerpt a single sentence from a judicial opinion and construe and interpret it apart from the context of the opinion in which it is found, and without regard to the subject matter under discussion is not only unreasonable, but at times, leads to erroneous conclusions.

Fealey *vs.* Bull, 163 N. Y., 397-401.

The language of *Mueller* vs. *Nugent*, and *Bank* vs. *Sherman* has no application to a case like this.

It is only such property of the bankrupt as is in his possession, or in the possession of some one for him, *not held under adverse claim or title, that is affected by the filing of the petition in bankruptcy. This is clearly manifested when the facts of those cases are examined.*

Bank vs. *Sherman* arose under the act of 1867, which vested the trustee with title as of the date of the filing of the petition, and was decided in February, 1880. It was there sought to reach certain securities transferred by the bankrupt to secure promissory notes executed before the petition was filed.

The petition was filed on the 23rd day of February, 1875. The securities in controversy were transferred on the 20th of March, 1875. The adjudication followed on the 12th of July, 1875, hence the Court properly held that the title to the securities transferred subsequent to the date of the filing of the petition, vested in the assignee as of the date of the filing of the petition, to wit, on the 23rd of February, 1875. There the bankrupt himself after the filing of the petition, undertook to dispose of his securities. Here the policies had been assigned two years before. The bankrupt after the filing of the petition did nothing whatsoever with respect to the policies. The Bank, on its own initiative, sought merely to enforce its contractual rights.

Bank vs. *Sherman* did not overrule or intend to limit to doctrine earlier enunciated in *Jerome* vs. *McCarter*, decided March, 1877.

In *Mueller* vs. *Nugent*, the petition was filed on the 19th day of February, 1900. The order of adjudication was entered on the 23rd of March, 1900. Subsequently the trustee applied for an order against the bankrupt, directing him to turn over to the trustee the sum of $14,435.45, which

it was alleged was held by William T. Nugent, a son of the bankrupt, and which belonged to the bankrupt estate. The Referee ordered William T. Nugent to show cause why the order to pay over should not be granted. He appeared and filed a response which in substance alleged, that having received the money from the bankrupt, prior to the filing of the petition, the Court had no jurisdiction to compel it to pay over. *He admitted that he held it for the bankrupt.*

This Court in its opinion said:

> "There was no pretense that at the date of the filing of this petition in bankruptcy this money of the bankrupt, $4,133.45 of which had been collected a few days, and $10,100 a few hours, before, was held subject to any adverse claim, or that the right or title thereto had been passed over to another" (p. 14). * * *
>
> "In this case, however, the defendant asserted no right or title to the property before the referee, and the circumstances under which he held possession, must be accepted as found by the referee and the District Court" (p. 15). * * *
>
> "In the case before us William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself" (p. 17).

This Court, however, has particularly called attention to the fact that the quoted excerpt from the opinion in Mueller *vs.* Nugent, is limited in its effect to the particular facts in that case, and has no application to a case like the one at bar.

In *York Manufacturing Co. vs. Cassell, 201 U. S., 344,* a contract was entered into between the York Manufacturing Co. and the bankrupt in the nature of a conditional sale. The property, which was the subject of the contract, came into the pos-

session of the bankrupt. After the adjudication, the vendor sought to recover the property of the trustee under the terms of the contract which provided that the title to and ownership of the property shall remain in the York Manufacturing Co. until the entire purchase price agreed upon had actually been paid in cash. This application was resisted by the trustee.

The Referee held that the York Manufacturing Co. had no lien on the machinery, but was a general creditor only. The District Court affirmed this ruling, which was in turn affirmed by the Circuit Court of Appeals.

This Court reversing the decisions of the lower Courts said at p. 352 of its opinion:

> "We come then to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate. We are of opinion that it did not operate as a lien upon the machinery as against the York Mfg. Co., the vendor thereof. Under the provisions of the Bankrupt Act, the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Mfg. Co., was in the latter Company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt. * * * THE REMARK MADE IN MULLER VS. NUGENT, 184 U. S., 1, 'THAT THE

> FILING OF THE PETITION (IN BANKRUPTCY) IS A CAVEAT TO ALL THE WORLD, AND IN EFFECT AN ATTACHMENT AND INJUNCTION, WAS MADE IN REGARD TO THE PARTICULAR FACTS IN THAT CASE. THE CASE ITSELF RAISED QUESTIONS ENTIRELY FOREIGN TO THE ONE HEREIN ARISING, AND DID NOT INVOLVE ANY INQUIRY INTO THE TITLE OF THE TRUSTEE IN BANKRUPTCY AS BETWEEN HIMSELF AND THE BANKRUPT, UNDER SUCH FACTS AS ARE BEING STATED. THE DISPUTE IN THE MULLER CASE WAS WHETHER THE COURT IN BANKRUPTCY HAD POWER TO COMPEL, IN A SUMMARY WAY, THE SURRENDER OF MONEY OR OTHER PROPERTY OF THE BANKRUPT IN POSSESSION OF THE BANKRUPT, *or of some one for him, without resorting to a suit for that purpose.* * * *" (Italics ours.)

Whitney vs. Wenman, 198 U. S., 539, cited by the Appellant, is wholly inapplicable to any phase of this case. A perusal of the opinion discloses that the point upon which the case turned, was the fact that under the allegations of the complaint, admitted to be true by the demurrer, the property sought to be recovered by the trustee, *was the property of the bankrupt in his possession at the time of the filing of the petition,* which came into the possession of the court upon the appointment of a Receiver, and which the Receiver without authority collusively delivered to the defendants.

At the same term at which *Whitney vs. Wenman* was decided, this Court also decided the case of *First National Bank against Chicago Title & Trust Co., 198 U. S., 280.*

There a trustee claimed the right to possession of certain merchandise of the bankrupt in storage, warehouse receipts for which he had hypothecated for loans. The trustee instituted summary proceedings for possession, and it was pointed out by this Court that jurisdiction of the District

Court did not exist *because that court had found that it was not in possession of the property.*

Refering to that case Mr. Justice Day in Whitney *v.* Wenman said:

> "In the case of First National Bank of Chicago *v.* Title & Trust Co. * * * in holding that the jurisdiction of the District Court did not obtain, it was pointed out that the Court had found that it was not in possession of the property."

Bryan vs. Bernheimer, 181 U. S., 188, also relied upon by the Appellant, is distinguishable for the reason that this Court particularly called attention to the fact that that case did not involve a question of jurisdiction over a suit by a trustee *against a person claiming an adverse interest in himself.*

In that case Abraham made a general assignment for the benefit of creditors to Davidson nine days before the filing of the petition in bankruptcy. The assignee sold the assigned estate to Bernheimer after the adjudication and before the appointment of a trustee. The petitioning creditors applied to the District Court for an order to take possession of the property which the Court ordered the Marshal to do. Notice was given to Bernheimer to appear and propound his claim. This he did voluntarily, and not content with stating the circumstances under which he purchased he asked for affirmative relief that the creditors be remitted to the fund in Davidson's hands derived from the purchase price of the property, or in default of such order, that Davidson be directed to pay the fund into court and that it be paid over to him, *he, thereupon offering to rescind the purchase and to waive all further claim to the property.* The petitioning creditors demurred to Bernheimer's claim, which was sus-

tained. The Circuit Court of Appeals reversed the District Court on the ground that the latter, as a Court of Bankruptcy, had no jurisdiction to try the question of title by summary proceedings.

It was this proposition to which this Court addressed itself in deciding the case and in reversing the judgment of the Circuit Court of Appeals stress was laid on the fact that Bernheimer consented to the form of the proceedings and that therefore the District Court as a Court of Bankruptcy, was authorized to determine the controversy.

That case presents no parallel to the present. Here the bank acquired its interest in the policies more than two years prior to the filing of the petition by the terms of an express contract, the validity of which cannot be doubted. It was entitled to sell the policies at public or private sale without notice or advertisement upon default. Default had occurred prior to the filing of the petition in bankruptcy, and thus the right of the bank to resort to its contractual remedy became perfect before there was any attempt to resort to the jurisdiction of a Court of Bankruptcy.

In the case at bar, the policies were not in the possession of the bankrupt, and never came into the actual or constructive possession of the Receiver. Further, the bankrupt had transferred them to the appellee by a power coupled with an interest which survived his death or insolvency. The bank's title could only be divested by payment of the debt.

As was aptly said by the Circuit Court of Appeals in its opinion in the case at bar (p. 823),

> "Under the former act, there were many decisions that a lien previously acquired

could not be enforced subsequent to the commencement of the proceeding, except with the permission of the Bankruptcy Court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. *Eyster v. Gaff, 91 U. S., 521; Jerome vs. McCarter, 94 U. S., 734.* The change in the present act by which the trustee's title is that only which exists at the date of the adjudication, removed any uncertainty which arose under the Act of 1867. It was intended, we think, to permit all legitimate business transactions between the debtor and those dealing with him to be carried out and consummated as freely, until he has been adjudicated a bankrupt, as though no proceeding were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of the petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect, if the rights and remedies of all concerned are in suspense, until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding. That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy, is indicated by the change made in the present act with respect to the proof of claims by secured creditors."

144 Fed. Rep., 818.

VII.

The decree appealed from should be affirmed in all respects with costs.

Respectfully submitted,

LOUIS MARSHALL,
FREDERICK M. CZAKI,
of Counsel.

Sup

Albert K.
of Jacob
Appella

The V

General
subdivisio
entitled by
States, the
entering its
conclusions
the Supren
only of the
the conclu

The Cir
finding of

August
Jacob M. M
were adjud
October pl
copartnersh
filed the fi
evidenced
pany, five
$2,500, we
tained the

"On the
any of the
signed fort
securities i
this note sh
and full po
and delive
substitutes
property gi
signed, for

upreme Court of the United States.

No. 244.—October Term, 1906.

: K. Hiscock, Trustee in Bankruptcy
acob M. Mertens et al., Bankrupts,
ellant.
vs.
ıe Varick Bank of New York.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[May 13, 1907.]

eral order in bankruptcy, No. XXXVI, relates to "Appeals," and ision 3 thereof provides: "In every case in which either party is d by the act to take an appeal to the Supreme Court of the United the court from which the appeal lies shall, at or before the time of ıg its judgment or decree, make and file a finding of the facts, and its sions of law thereon, stated separately; and the record transmitted to preme Court of the United States on such an appeal shall consist f the pleadings, the judgment or decree, the finding of facts, and nclusions of law."

Circuit Court of Appeals, in pursuance thereof, made and filed its g of the facts and its conclusions of law thereon.

gust 18, 1903, a petition in bankruptcy was filed against the firm of M. Mertens & Company and the individual members thereof. They adjudicated bankrupts September 15, and on the following 14th of er plaintiff in error was elected trustee in bankruptcy of both the nership and the individual estates. At the time the petition was ıe firm was indebted to the Varick Bank to the amount of $27,893.85, ced by notes made or endorsed or guaranteed by Mertens & Com- five of which aggregating $22,500, four for $5,000 each, and one for , were collateral notes. These notes were alike in form and con- the following provision:

ı the non-performance of this promise or upon the non-payment of the liabilities above mentioned, or upon the failure of the under- forthwith, with or without notice, to furnish satisfactory additional ies in case of decline as aforesaid,—then, and in either such case, te shall forthwith become due and payable, without demand or notice ll power and authority are hereby given to said holder to sell, assign eliver the whole of the said securities, or any part thereof, or any utes therefor, or any additions thereto, or any other securities or ty given unto or left in the possession of the holder by the under- , for safe keeping or otherwise, at any Broker's Board or at public

or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said holder may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to it or him as to it or him shall seem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said holder for any deficiency arising upon such sale or sales. The undersigned do hereby authorize and empower the said Bank (but no other holder) at its option, at any time, to appropriate and apply to the payment and extinguishment of any obligations or liabilities of the undersigned to it, whether now existing or hereafter contracted any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due."

Endorsed upon the back of each of these notes and signed by J. M. Mertens & Co. and J. M. Mertens appeared the following:

"In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y., its successors, endorsers or assigns, the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guarantee, notwithstanding such changes, surrender or extension."

On the day the petition was filed, Mertens individually was indebted to the bank in the sum of $25,489.62. This indebtedness was upon his guaranty of the five collateral notes, of one of which he was also the maker, the balance being based upon his endorsement of sundry notes of third parties amounting to about $3,000. Mertens individually, to secure the payment of the indebtedness to the bank, pledged to it two policies of insurance upon his life, one for $50,000, No. 417,171, and the other for $10,000, No. 252,314. The $50,000 policy was a free Tontine policy, issued February 15, 1889, payable to Mertens or his estate, the yearly premium was $1,750, and the Tontine dividend period expired February 15, 1909. The $10,000 policy was issued December 21, 1882, payable to Jennie Mertens, wife of the insured, but in the event of her prior death, to the children of the insured, and the annual premium was $272.50. It was a Tontine savings policy and the Tontine period was completed December 21, 1902, at which time Mertens, as the insured, withdrew in cash the share of the surplus ap-

portioned to the policy, and continued it in force on the ordinary plan. On March 16, 1901, Jennie Mertens and the children of Jacob and Jennie executed an assignment of the $10,000 policy to the bank. On March 25, 1901, J. M. Mertens joined with his wife in executing a further assignment of the same policy to the bank. March 21, 1901, Mertens individually executed an assignment of the $50,000 policy to the bank. These assignments contained no power of sale. In addition the policies were pledged to the bank under the terms of the collateral notes and agreements of pledge. It appeared from the proofs that the claim against Mertens individually was secured by an individual deposit of Mertens of the sum of $6,000 as collateral, in addition to the policies.

Obligations aggregating $1,691.93, endorsed by Mertens, had matured and remained unpaid on August 18, and on September 15, obligations aggregating $13,570.47 had matured and remained unpaid, and in the latter amount were included two of the collateral notes for $5,000 each and some $3,000 of the notes of third persons, endorsed by Mertens individually.

On or before September 14, 1903, the two policies were delivered to a duly licensed auctioneer by the attorneys of the bank with instructions to sell the same at public auction at the New York Real Estate Office salesrooms, to the highest bidder, and they were offered for sale and sold to the highest bidder, an agent of the bank, on September 14, the $50,000 policy for the sum of $7,000 and the $10,000 policy for the sum of $3,250. No notice of the sale was given to any one except the bank. In due time the bank filed with the referee in bankruptcy two proofs of claim, one against the co-partnership estate aggregating $27,893.85, and another against Mertens for the sum of $9,118.37. Thereafter the claims were amended. Objections to both were filed by the trustee, alleging in substance that the sales of the policies were illegal; that the value of the securities held by the bank had not been ascertained according to the provisions of the bankruptcy act, and that the trustee still owned the equity.

No other evidence than appearing above was offered by the trustee on the hearing before the referee under the objections. The referee held, in substance, that the sale of the policies was null and void, and that the value of the securities had not been ascertained according to the provisions of section 57*h* of the bankruptcy act, and refused to allow either claim against the estate or estates. Counsel for the trustee moved for the referee to direct a method by which the security held by the bank should be liquidated and that in so doing he direct the bank to resell the policies on notice to the trustee. The motion was objected to, but was granted by the referee. The bank petitioned for a review, and the District Court of the United States for the Northern District of New York on such review

approved the referee's rulings. 134 Fed. Rep. 101. From the order of the District Court the bank appealed to the United States Circuit Court of Appeals for the Second Circuit. That court, as previously stated, filed its finding of the facts and its conclusions of law, which conclusions of law were as follows:

"1. That the order made by the referee and by the District Court was a rejection of the claims of the Varick Bank.

2. That the policies in question did not belong to the partnership estate, and that the claim against the partnership should have been allowed in full.

3. That the sale of the policies under the facts as stipulated was a good and valid sale and passed a good and valid title to said policies to the Varick Bank.

4. That the value of said policies was properly liquidated by said sale under the terms of section 57 *h* of the Bankruptcy Act and that under said section the referee had no power to make the order directing a resale thereof.

5. That said Bankruptcy Act did not suspend or enjoin the exercise of said power of sale during the time between the filing of the petition and the adjudication in bankruptcy.

6. That the claim against the individual estate of Jacob M. Mertens should be allowed in full.

7. That the burden of proving that said sale was unfair was upon the trustee."

The order of the District Court was reversed and the case remanded with instructions to proceed conformably with the opinion of the Circuit Court of Appeals. 144 Fed. Rep. 818. The case was then brought to this court on appeal.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The errors assigned question the conclusions of law.

We need spend no time on the objection that the Referee's order did not amount to the rejection of the claims. What the Referee said was: "As the proof now stands, I shall, therefore, decline to allow either claim as established against the estate or estates."

The District Judge recited the action of the Referee as disallowing both claims, and entering "an order prescribing the method for ascertaining the value of such policies," and concluded: "The orders of the Referee disallowing the claims are approved and affirmed." 134 Fed. Rep. 102, 104. And entered an order accordingly.

The Circuit Court of Appeals held "that the order appealed from was, in substance and effect, a rejection of the claims," and said: "The bank insisted that its claims were for a definite amount, the amount stated in its proofs of debt less the sum which it had already derived from the sale of

the securities. The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction."

We think it perfectly clear that the policies did not belong to the partnership estate. They insured the life of J. M. Mertens, and were payable, one to him or his legal representatives, and the other to his wife or children, or to him in the event of their death before his. And they had been assigned to the bank by him individually and the members of his family, as early as March, 1901, as collateral security, as well as by the collateral notes before mentioned. The fact that Mertens individually was the owner was in effect conceded, and the objections to the claims raised no issue in regard to it. That the partnership on some occasion may have pledged the policies in conjunction with Merten's separate individual pledge had no special significance.

The notes provided that the holder might apply the proceeds of a sale to "pay one, or more, or all of the liabilities due it, as it shall deem proper, whether due or not." And it had the right according to the settled rule in equity and in courts of bankruptcy to apply the proceeds of the collateral in extinction of the individual debts. If the sale was a good and valid sale and the value of the policies was properly liquidated thereby, and applied on the individual indebtedness, it follows that the claim against the partnership should have been allowed in full.

And also the claim against the individual estate of Mertens for the balance, after deducting the $10,250 and the $6,000.

The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties were governed by the law of that State. No preference under the bankruptcy act was alleged or proved, nor was there any allegation or proof that the pledge of the securities was in fraud of the rights of the creditors or trustee. The questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court. *York Manufacturing Company* v. *Cassell*, 201 U. S. 344; *Thompson* v. *Fairbanks*, 196 U. S. 516, 522; *Humphrey* v. *Tatman*, 198 U. S. 91. Here there was an absolute power of sale coupled with an interest. The bank had had both title and possession of the policies for a period of more than two years before the filing of the petition. It had a valid debt against both the copartnership and individual estates, which is not questioned. It could, therefore, make a sale under the power granted, and transfer title in its own name. Numerous decisions of the Court of Appeals of the State of New York sustain contracts of pledge waiving the right of the pledgor to exact strict performance of the common law duties of a pledgee. In the absence of fraud, the pledgee may buy at his own

sale held without notice, or demand, or advertisement, when power so to do is expressly granted by the pledgor. *Baker* v. *Drake*, 66 N. Y. 518; *Williams* v. *Trust Company*, 133 N. Y. 660; *Toplitz* v. *Bauer*, 161 N. Y. 325. And see *National Bank* v. *Baker*, 128 Ill. 533; *McDowell* v. *Chicago Steel Works*, 124 Ill. 491; *Farmers' National Bank* v. *Venner*, 78 N. E. Rep. 540.

It must be remembered that the Circuit Court of Appeals found that there was no fraud in fact in the sale. In respect of that Judge Wallace, delivering the opinion, said:

"The court below regarded the sale made by the bank as a fraudulent sale. There was no evidence of fraud, unless the facts which have been referred to justify the inference of fraud. We are at a loss to understand how fraudulent conduct can justly be imputed to a pledgee when it appears that whatever was done in executing the power of sale was done in full compliance with the terms of the pledge, and when there is no evidence that any unconscionable advantage was taken of the pledgor or his creditors. Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase it himself at a valuation so inadequate as to suggest a fraudulent purpose. If the valuation in this case was unfair, the burden was on the trustee to prove the fact."

The trustee did not offer to prove that others were prepared to purchase and might have done so but for want of information, or that the policies had a greater value than was realized at the sale, or that he was prepared to redeem the pledge for the benefit of the estate, nor did he offer to do so. There was nothing in the evidence tending to show a wanton sacrifice or an intention to buy in at so inadequate a price as to justify the inference of a fraudulent purpose.

Counsel for the trustee contends that the policies were worth more than was obtained at the sale, because the bank's agent, after having borrowed on the strength of the policies the exact amount of his bid immediately after the sale, subsequently borrowed thereon $2,622.75; and also that from the terms of the $50,000 policy it appeared that on the completion of the Tontine dividend period, February 15, 1909, the assured had the privilege to withdraw in cash $18,823, and in addition the surplus which might then be apportioned. And counsel called attention in his brief filed herein, February 26, 1907, to the case of *Hiscock, Trustee*, v. *Mertens* then pending in this Court as demonstrating that the $50,000 policy was worth more than was realized at the sale. But the $2,622.75 loan covered the next ensuing premiums on the policies with interest; and the $7,000 paid for the $50,000 policy with interest and the premiums of February, 1904, 1905, 1906, 1907 and 1908, with interest, and the last premium, would appear to have aggregated a total cost of $21,346.50; while if resort could be properly

had to the record in another case to piece out the evidence in this the opinion in *Hiscock* v. *Mertens*, decided March 25, 205 U. S. 202, states that the evidence showed that this particular policy had a surrender value of $6,574. And as to the $10,000 policy no suggestion was made that the $3,250 was not a full price or even more, nor could there be in reason, for as Ray, J., said, *In re Mertens et al.*, 131 Fed. Rep. 972, "it had become a simple life policy, payable to the wife of the assured, if living at his death; if not living, to his children, if any; and in default of child or children to the personal representatives of the assured. This policy concededly is so conditioned and incumbered, and the interest of the trustee therein, if any, is so remote and uncertain that it is of no practical value to the estate." Clearly there is nothing on the face of the record to justify a charge of fraud on account of inadequacy.

Section 57*h*, provides: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The court was by this subdivision empowered to direct a disposition of the pledge, or the ascertainment of its value, where the parties had failed to do so by their own agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises. Of course where there is fraud or a proceeding contrary to the contract the interposition of the court might properly be invoked.

According to the terms of the bankrupt act, the title of the bankrupt is vested in the trustee by operation of law as of the date of the adjudication. Act of 1898, § 70, *a. e.* By the act of 1867, it was provided that as soon as an assignee was appointed and qualified the judge or register should, by instrument, assign or convey to him all of the property of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to such estate, both real and personal, in the assignee." But § 70 *a* of the act of 1899 omits the provision that the trustee's title "shall relate back to the commencement of the proceedings in bankruptcy," and explicitly states that it shall vest "as of the date he was adjudicated a bankrupt." When the petition in the present case was filed the bank had a valid lien upon these policies for the payment of its debt: The contracts under which they were pledged were valid and enforceable under the laws of

New York where the debt was incurred and the lien created. The bankruptcy act did not attempt by any of its provisions to deprive a lienor of any remedy which the law of the State vested him with; on the other hand, it provided, § 67 *d*: "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Mueller v. *Nugent*, 184 U. S. 1, is not to the contrary, as explained in *York Manufacturing Company* v. *Cassell*, 201 U. S. 344.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.